TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 136.

J. WARREN GRIGSBY AND SUSAN P. GRIGSBY, APPELLANTS,

vs.

C. W. PURCELL & CO., D. J. SAUNDERS, RECEIVER, ETC., W. B. ISAACS & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 12, 1876.

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1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term of said court held for its February term, 1875, at the Federal court hall in the city of Louisville.

Present, the honorable Bland Ballard, judge of the United States for the district of Kentucky.

C. W. PURCELL & CO. ET AL.
vs.
J. WARREN GRIGSBY ET AL.

Be it remembered that heretofore, to wit, on the 4th day of August, A. D. 1871, came the complainants, by their attorney, W. O. Harris, and filed in the clerk's office of our said court their bill against the above-named defendants, which said bill is in the words and figures as follows, to wit:

Bill.

To the honorable the judges of the circuit court of the United States for the district of Kentucky.

C. W. Purcell, who is a citizen of the State of Virginia and a banker, doing business in the city of Richmond in said State, under the firm-name and style of C. W. Purcell & Co; the president, directors,
2 and company of the Farmers' Bank of Virginia, a corporation created by the laws of said State, and carrying on business in the city of Richmond in said State, suing herein by David J. Sanders, receiver, who is also a citizen of said State and resident of said city; W'm B. Isaacs, W'm G. Taylor, and John C. Williams, who are citizens of said State of Virginia, and bankers, doing business in said city of Richmond under the firm-name and style of W. B. Isaacs & Co., bring this their bill for the benefit of themselves and such other creditors, under a deed of trust, which is hereinafter set out, as may appear to this suit and bear their proportion of the expense hereof, against J. Warren Grigsby, of Shelby City, and J. A. Grinstead, of Lexington, who are citizens of the State of Kentucky, and S. M. Moore, of Chicago, who is a citizen of the State of Illinois.

And thereupon your orators complain and say that on the 10th day of December, 1857, the defendant, J. Warren Grigsby, made and entered into a certain deed, a copy of which is herewith filed, marked "A," whereby he conveyed to R. Pindell certain real estate situated in the city of Chicago, State of Illinois, in trust, to secure the payment of divers bills, notes, and other evidences of indebtedness on the part of the said Grigsby, which are set out and described in said deed as of
3 the 1st, 2d, 3rd, and fourth classes, and directed to be paid by the trustee in the order of preference indicated by their classification, for which purpose full and complete power was given said Pindell to sell and convey any or all the property embraced in said deed at public or private sale, and upon such terms as he might think proper.

Complainants further say that in the 4th class of debts whose payment is provided for in said deed are enumerated "all the debts of the house of Taylor, Shelby & Co., created since the 14th day of July, 1857, for which said party may be legally liable, it being the express intent of this indenture not to create any liability except as they may now exist him."

Complainants further say that on the 5th day of September, 1857,

said firm of Taylor, Shelby & Co., a firm doing business in the town of Lexington, State of Kentucky, and composed of E. H. Taylor, jun., Isaac Shelby, and Z. W. Grigsby, being indebted to complainants, C. W. Purcell & Co., drew their bill of exchange, addressed to the Shoe and Leather Bank of New York, requesting it to pay to Theodore Johnston or order, on the 29th day of September, after date, acceptance waived, the sum of seven thousand six hundred and fifty dollars and four cents
4 ($7,650.04), which bill was thereupon endorsed in blank by the said Johnston and delivered to said complainants, C. W. Purcell & Co. That on the 29th day of September, after the date of said bill, C. W. Purcell & Co. caused said bill to be presented by a notary public, duly qualified to act in the city of New York, to the said Shoe & Leather Bank, at its place of business in said city, and payment demanded, which was refused. Whereupon the said bill was protested, and notice thereof sent to the drawers and endorsers. Said bill and protest are filed, marked "B."

Complainants further say that on the 5th day of September, 1857, the said firm of Taylor, Shelby & Co., being indebted to the Farmers' Bank of Virginia, drew their certain other bill of exchange, addressed to the Shoe and Leather Bank of New York, requesting it to pay to the order of Theodore Johnston, on the 6th day of October after date, acceptance waived, the sum of eight thousand four hundred and fifty-six dollars and ninety cents ($8,456.90), which said bill was thereupon endorsed in blank by the said Johnston and delivered to the said Farmers' Bank of Virginia. That on the 6th day of October next after the date of said bill, the said Farmers' Bank of Virginia caused the same
5 to be presented by a notary public, duly qualified as such in the city of New York, to the said Shoe and Leather Bank, at its place of business in said city, and payment demanded, which was refused. Whereupon said bill was protested, and notice thereof given to the drawers and endorsers. Said bill and certificate of protest are herewith filed, marked "C."

Complainants further say that on the 5th day of September, 1857, the said firm of Taylor, Shelby & Co., being further indebted to the said Farmers' Bank of Virginia, drew their certain other bill of exchange, addressed to the Shoe & Leather Bank of New , requesting it to pay to the order of Theodore Johnston, on the 14th day of October after date, acceptance waived, the sum of seven thousand dollars; whereupon the same was endorsed in blank by the said Johnston and delivered to the said Farmers' Bank. That on the 14th day of October next afte the date of said bill, the said Farmers' Bank caused the same to be presented by a notary public, duly qualified to act in and for the city of New York, at the said Shoe and Leather Bank in said city, and payment demanded, which was refused; whereupon the same was duly protested, and notice thereof sent to the drawers and endorsers. Said bill and protest are herewith filed, marked "D."

6 Complainants acknowledge, as a credit to be applied rateably to their said debts, the sum of two thousand one hundred and fifty-six dollars and ten cents ($2,156\frac{10}{100}$), and the further sum of seven thousand five hundred dollars ($7,500) as of the 20th of Feb'y, 1859, and the 13th of March, 1860, respectively, and complainants further say that on the 9th day of May, 1868, complainant, David J. Sanders, was appointed receiver of the said Farmers' Bank of Virginia, by the circuit court of the United States for the district of Virginia, in the case of William Bayen, A. J. Duncan, and J. W. Jenkins, against said Farmers'

Bank of Virginia and others, a cause lawfully within the jurisdiction of said court.

A certificate of said appointment, under the hand of the clerk and seal of the court, is filed herewith as part hereof, marked "E;" and complainants further say that said David J. Sanders, acting under and by virtue of his said appointment as receiver, did, on the 9th day of February, 1871, assign to his complainants, W. B. Isaacs & Co., the debt of said bank against said Taylor, Shelby & Co., by an instrument herewith filed, marked "F," and said Sanders united in this suit for the benefit of said Isaacs & Co.

Complainants further say that said Richard Pindell did, at
7 divers times, sell portions of the property embraced in said deed of trust, which remained then unsold, for the expressed consideration of fifty thousand dollars ($50,000^{00}_{100}$); that after the date of said conveyance, the said Pindell departed this life, and no personal representative has qualified.

Complainants further state that the true and actual consideration of said conveyance was as follows, to wit:

1st. A note of Henry E. Pickett for $9,750.00), dated Chicago, May 3rd, 1870, payable to the order of Sam'l J. Walker, at the Second National Bank of Chicago, with 6 per cent. interest, and endorsed by Sam'l J. Walker. Said note is now in the possession of the defendant, J. A. Grinstead, who unlawfully and fraudulently detains the same.

2nd. A note of said Pickett for $9,750.00, of like tenor and date, payable 3 years after date, which is now in the possession of the defendant, Sam'l M. Moore.

3rd. A note of said Pickett for $9,750.00, of like tenor and date, payable 2 years after date; a note of said Pickett, dated Chicago, Oct. 13th, 1870, $7,500.00, payable 18 months after date, with 6 per cent. interest; and two notes of Brian Philpot for $6,660.00 each, dated
Chicago, Oct. 14th, 1870, payable in one and two years respect-
8 ively; which said four notes above described are in the possession of the defendant, J. Warren Grigsby, who fraudulently and unlawfully detains the same.

Complainants further say that the creditors mentioned in the deed of trust before described cannot be brought before the court on account of their great number. They are ignorant who are now the holders of the bills and notes set out in said deed, or whether any or all of them are still due and unpaid; they are also ignorant and unable to discover what are now the outstanding debts of the firm of Taylor, Shelby & Co., and they call upon the defendant Grigsby for a discovery of those matters and for a full exposition of the debts now existing against the property conveyed in trust to Pindell and its proceeds hereinbefore mentioned.

Wherefore they pray that the defendants may be enjoined and restrained from the collection of the notes held by them respectively as aforesaid, that they be compelled to assign and deliver them to a receiver to be appointed by the court, whose duty it shall be to collect them as they severally fall due, by suit or otherwise, and hold the proceeds, subject to the order of the court, and that this cause
be referred to the master, with directions to advertise for cred-
9 itors in the manner directed by the court, and to report such as are entitled to prove their debts under the deed of trust hereinbefore set out, and for all general and proper relief.

And may it please your honor to grant unto your orators the writ of subpœna commanding the defendants, J. Warren Grigsby, J. A.

Grinstead and S. M. Moore, under a penalty, to appear by a named day and answer the premises and abide the decree of the court.

W. O. HARRIS,
Solicitors for Complainants.

The Exhibit A, referred to in the within bill, is as follows:

EXHIBIT A.

This indenture made this 10th day of December, 1857, between J. Warren Grigsby, of Lincoln County, Kentucky, of one part, and R. Pindell, of Lexington, of the other part, witnesseth:

That the said party of the first part, for and in consideration of the premises, and the further sum of one dollar to him paid by the party of the second part, the receipt whereof is hereby acknowledged, hath bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth bargain, sell, alien, remise, release, convey and confirm unto the said party of the second, all the following lots,
10 pieces, and parcels of land situate, lying and being in the county of Cook and State of Illinois, to wit: One-seventh undivided interest in the tract known as Canal Part, in sections 25 & 30, chiefly within the limits of the city of Chicago. An undivided interest of three-fourteenths in four acres known as the Ulich property. An undivided one sixth in lot one, block 56, in the city of Chicago. An undivided one-sixth in eighty acres near Brighton. Together with all and singular the tenements, hereditaments, equities, and appurtenances thereunto belonging or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well at law as in equity, of the said party of the first part, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances, and to all other property the party of the first part may have in the county of Cook, it being the true intent of this deed to embrace and dispose of all the right, title, and interest he may have in said county.

To have and to hold all and singular the above-mentioned and
11 described premises, together with the appurtenances, unto the said R. Pindell, his successors and assigns, in trust and to & for the several uses, intents, and purposes hereinafter mentioned, namely:

First. To secure the payment of the following debts due by note or acceptances & all other notes or acceptances given in renewal of the same, to wit: An acceptance of five thousand dollars of the party of the first, discounted and now held by the Agricultural Deposit Bank of Lexington, Kentucky; an acceptance of same, discounted and now held by the Branch of the Commercial Bank of Kentucky, at Harrodsburgh, for twenty-five hundred dollars; two notes of said party to Geo. H. McKinney, administrator of T. Huston, both due on the 15th of September, 1857, one for three thousand two hundred & fifty-five dollars, and the other for one thousand one hundred dollars; a note of said party to Wm C. Hart, for seven thousand three hundred and twenty-two dollars, due on demand, about the 13th day of June, 1857; a note of said party to N. H. Walter, for eight hundred and thirty-seven dollars, due Jan. 1, 1858; an amount due by said party to Tho's H.
12 Shelley, trustee, of two thousand eight hundred and seventy-five dollars; an amount of about thirty-five hundred dollars due by

said party in small sums, to various in various places in Kentucky, principally current accounts of the year.

Secondly. And after the payment of said mentioned debts, to secure the payment of the following debts and liabilities of the said party: An acceptances by W. F. Roelosson of the draft of said party for eight thousand three hundred and twenty-three dollars & 20 cents, due in N. Y. Nov. 9, 1857; a check of Taylor, Shelley & Co. on Shoe and Leather Bank, N. Y., due Oct. 1st, 1857, for ten thousand dollars, endorsed by said party, and now held by the Branch of the Bank of Kentucky, Danville; two acceptances of Geo. N. Sanders for six thousand dollars each of the drafts of W. F. Roelosson endorsed by said party of the first part or J. P. Grigsby, held by the Central Bank of Kentucky, at Danville, and past due; a note of Isaac Shelley, jr., with Isaac Shelley, sen., as security, to Jno. R. Desha, for eight thousand three hundred and fourteen dollars & 75 cents, dated Sept. 30, 1857, and due at four months after date, given for the benefit of Taylor, Shelley & Co.; an acceptance for fifteen thousand nine hundred dollars, drawn by R. Pindell, accepted
by Isaac Shelley, endorsed by James B. Clay, dated Sept. 15,
13 1857, & due in ninety days, now held by R. Brown and given for the use of the house of Taylor, Shelley & Co.; a note of Isaac Shelley with Jas. B. Clay as security, held by B. B. Sayre, for sixty-four hundred & seventy-five dollars, dated Sept. 25th, 1857, & due July 1, 1858, given for the use of the house of Taylor, Shelley & Co.

Thirdly. To secure the payment after said debts, &c., mentioned are paid, two notes, one for fifteen thousand dollars, payable at the Northern Bank, Lexington; one for ten thousand dollars, to the Branch of the Bank of Kentucky, Lexington, Kentucky, both dated Sept. 28, 1857, due at four months, and executed by Taylor, Shelley & Co., Thos. H. Shelley as security.

Fourthly. To secure the payment, after said debts, &c., mentioned are paid, of all the debts of the house of Taylor, Shelley & Co. created since the 14th day of July, 1857 (fourteenth day of July), for which said party may be liable, it being the express intent of this indenture not to create any liability except as they may now legally exist he'in; an acceptance by the said party of a draft for thirteen thousand three hundred and thirty-three dollars $\frac{33}{100}$ drawn by W. F. Roelesson, endorsed by
14 Lewis Castleman, dated Lexington, Ken., Feb. 10th, 1857, & due twelve months after date; also six notes jointly executed by said party, E. H. Taylor and W. F. Roelesson, to S. J. Walker, for the payment of which a lien on the property was retained, are expressly excepted from the benefit of this trust and are only to be paid from the funds arising under it.

After all the debts herein specifically provided for are paid, and all other debts due by the said party of the first part, the said party of the second part is hereby fully empowered to divide said lots and lands herein conveyed & executed, all proper conveyances & other instruments of writing necessary to carry the same into effect, & in said division is to be only held responsible for the use of his proper judgment and discretion. He is also fully and completely authorized and empowered to control, manage, sell, convey, and otherwise dispose of said premises at any time, in any manner, and upon any terms he may deem reasonable and proper at either public or private sale; the said party hereby fully invests said trustee with all the power he himself possesses for the purpose of selling, conveying, and disposing of said property for the
15 payment of debts herein set forth. He reserves the power of appointing by will or deed a new trustee in the event of the death,

resignation, or failure to act of the said trustee herein appointing, & the said trustee so appointed, with all the powers herein granted to the said original trustee.

The said party of the second part hereby reserves the right of declining the trust herein created at any time by deed duly acknowledged and proven; and he doth hereby signify his acceptance of his trust, and doth hereby covenant and agree to and with the said party of the first part faithfully to discharge and execute the same according to the true intent and meaning of these presents.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

J. WARREN GRIGSBY. [SEAL.]
R. PINDELL [SEAL.]

Witnesses—
ISAAC SHELLEY.
ED. CRONLY.

STATE OF KENTUCKY,
Fayette County, ss:

Be it remembered that on this tenth day of December, in the year of our Lord one thousand eight hundred & fifty-seven, before me
16 the undersigned, Benjamin F. Graves, a commissioner, resident in the city of Lexington, in the county of Fayette, in the State of Kentucky, duly commissioned and qualified by the executive authority and under the laws of the State of Illinois to take the acknowledgement of deeds and other instruments in writing, under seal, to be used or recorded in the said State of Illinois, personally appeared J. Warren Grigsby & Richard Pindell, whose signatures appear to the foregoing deed or instrument of writing, and who are personally known to me to be the real persons who subscribed and executed the same, and acknowledged the same to be their free act and deed for the consideration, uses and purposes therein expressed.

In witness whereof I have hereunto set my and affixed my official seal as such commissioner, this the 10th day of December, A. D. 1857.

[SEAL.] BENJAMIN F. GRAVES,
Commissioner for the State of Illinois in the State of Kentucky.

STATE OF KENTUCKY,
Fayette County, ss:

Be it remembered, that on this the tenth day of December, in
17 the year one thousand eight hundred & fifty-seven, before me, Benjamin F. Graves, a notary public within and for the county of Fayette, in the State of Kentucky, duly commissioned, qualified and sworn, personally appeared J. Warren Grigsby and Richard Pindell, whose signatures appear to the foregoing deed or instrument in writing, and who are personally known to me to be the real persons who subscribed and executed the same, and acknowledged the same to be their free act and deed for the consideration, uses, and purposes therein mentioned and expressed.

Given under my hand & notarial seal this, the 10th day of December, A. D. 1857.

[SEAL.] BENJAMIN F. GRAVES,
Notary Public for Fayette County, Kentucky.

A true copy. Attest:

LOUIS NAHM.

The exhibits B, C, & D, referred to in the bill, are as follows:

EXHIBITS B, C, D.

No. 7279.] TAYLOR, SHELLEY & CO., BANKERS,
$7,650.$\frac{4}{100}$.] *Lexington, Ky, Sept.* 5, 1857.

On the tweny-ninth September, after date fixed, acceptance waived. Pay to the order of Theodore Johnston seventy-six hundred & fifty $\frac{4}{100}$ dollars.

29th Sept.

TAYLOR, SHELLEY & CO.

To Shoe and Leather Bank, New York City.

(Across the face in red:) J. Warren Grigsby, 7279, seventy-six hundred & fifty $\frac{4}{100}$ dollars.

18 (Endorsed on back as follows:) Theodore Johnston. Pay to C. W. Purcell & Co.

STATE OF NEW YORK,
United States of America, ss:

On the 29th day of September, in the year of our Lord one thousand eight hundred and fifty-seven, at the request of Peter Campbell & Co., in the city of New York, I, Charles A. Davison, notary public, duly admitted and sworn, dwelling in the city of New York, did present the original draft hereunto annexed to a teller in the Shoe and Leather Bank, at said bank, and demanded payment of the same, which was refused.

Whereupon I, the said notary, at the request aforesaid, did protest and by these presents do publicly and solemnly protest, as well against the drawer and endorsers of the said draft as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred, for want of payment of the said draft.

Thus done and protested in the city of New York, aforesaid, in the presence of John Doe and Richard Roe, witnesses.

In testimonium veritatis,

C. A. DAVISON,
Notary Public for Mercantile Bank.

19 No. 9277.] TAYLOR, SHELLEY & CO., BANKERS,
$8,456.90.] *Lexington, Ky., Sept.* 5, 1857.

On the sixth October, after date fixed, acceptance waived. Pay to the order of Theodore Johnston eighty-four hundred & fifty six $\frac{90}{100}$ dollars.

TAYLOR, SHELLEY & CO.

To Shoe & Leather Bank, New York City.

(Across the face in red:) J. Warren Grigsby, 9277, eighty four hundred & fifty-six $\frac{90}{100}$ dollars.

(Endorsed on back as follows:) Theodore Johnston. Pay to the order of E. H. Arthur, esquire, cas.

J. A. SMITH.

STATE OF NEW YORK,
United States of America:

On the sixth day of October, in the year of our Lord one thousand eight hundred and fifty-seven, at the request of the cashier of the Union

Bank in the city of New York, I, Joseph Spencer York, notary public, duly admitted and sworn, dwelling in the city of New York, did present the original draft hereunto annexed to the paying teller of the Shoe and Leather Bank, at said bank in this city, and demanded payment of the same, which was refused.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer and endorsers of the said draft as against all others
20 whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred, for want of payment of the said draft.

Thus done and protested in the city of New York aforesaid, in the presence of John Doe and Richard Roe, witnesses.

In testimonium veritatis,

[SEAL.]

JO. S. YORK,
Notary Public for Union Bank.

No. 9273.] TAYLOR, SHELLEY & CO., BANKERS,
$7,000.] *Lexington, Ky., Sept.* 5, 1857.

On the fourteenth October, after date fixed, accept. waived. Pay to the order of Theodore Johnston seven thousand dollars.

TAYLOR, SHELLEY & CO.

To Shoe & Leather Bank, New York City.

(Across the face in red:) J. Warren Grigsby, 9273, seven thousand dollars.

Endorsed on back as follows: Theodore Johnston pay to the order of

STATE OF NEW YORK,
United States of America:

On the fourteenth day of October, in the year of our Lord one thousand eight hundred and fifty-seven, at the request of the cashier of the Union Bank in the city of New York, I, Joseph Spencer York,
21 notary public, duly admitted and sworn, dwelling in the city of New York, did present the original draft hereunto annexed to the paying teller of the Shoe & Leather Bank, at said bank in this city, and demanded payment of the same, which was refused.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer and indorsers of the said draft as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred for want of payment of the said draft.

Thus done and protested in the city of New York aforesaid, in the presence of John Doe and Richard Roe, witnesses.

In testimonium veritatis,

[SEAL.]

JO. S. YORK
Notary Public for Union Bank.

Exhibit E. referred to in the bill, is as follows:

EXHIBIT E.

In the clerk's office of the circuit court of the United States for the district of Virginia.

RICHMOND, *March 3rd*, 1871.

I, M. F. Pleasants, clerk of the court aforesaid, do hereby certify that David J. Sanders was duly appointed receiver of the Farmers' Bank of

Virginia, in the case of W'm Bayne, A. J. Duncan, & J. W. Judkins, against said bank et al., on the 9th day of May, A. D. 1868.
22 Witness my hand and the seal of said court affixed the day and year first above written.

[SEAL.] M. F. PLEASANTS, *Clerk.*

Exhibit F, referred to in the bill, is as follows, viz:

EXHIBIT F.

RICHMOND, *February* 9, 1871.

I, David J. Saunders, receiver of the Farmers' Bank of Virginia, do hereby assign to Mess'rs W'm B. Isaacs & Co., of Richmond, Virginia, all right, title, and interest the said bank has in a claim against Taylor, Shelley & Co., of Kentucky, all claims rising out of or in any way connected with the said claim against said Taylor, Shelley & Co.

DAVID J. SAUNDERS,
Receiver Farmers' Bank Virginia.

[5 cent int. rev. stamp.]

Upon which bill issued the following subpœna in chancery, viz:

Subpœna.

The President of the United States of America to the marshal of the Kentucky district, greeting:

You are hereby commanded to summon J. Warren Grigsby, J. A. Grinstead, and S. M. Moore to appear before our circuit court of
23 the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the 1st Monday in September next, to answer a bill in equity exhibited against them in our said court by C. W. Purcell & Co., the president, directors, and company of the Farmers' Bank of Virginia, and William B. Isaacs & Co., which they shall in no wise omit, under the penalty of four hundred dollars.

And have you there this writ.

Witness the honorable Salmon P. Chase, Chief Justice of the *the* Supreme Court of the United of America, and the seal of our said court hereto affixed, at the clerk's office of said court in Louisville, this 4th day of August, A. D. 1871, and in the ninety-sixth year of our Independence.

Attest:

[SEAL.] W. A. MERIWETHER, *C. C. C. K. D.*,
By SAM. B. CRAIL, *his Deputy.*

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office on or before the 4th day of September next, the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

W. A. MERIWETHER, *Clerk.*,
By SAM. B. CRAIL, *D. C.*,

Upon which the marshal made the following return:

24 *Marshal's return.*

Executed by delivering a copy of the within to J. Warren Grigsby August 19th, 1871. J. A. Grinstead & S. M. Moore not found.

ELI H. MURRAY, *U. S. M.*,
By JOHN WYATT, *Deputy.*

And on September 4th the demurrer of J. W. Grigsby was filed, which said demurrer is as follows:

Demurrer of J. W. Grigsby.

United States circuit court for the circuit and district of Kentucky.

The demurrer of J. W. Grigsby to a bill in chancery filed against him and others in this honorable court by C. W. Purcell and others.

This defendant, by protestation, not confessing all or any of the matters and things in said complainants' bill contained to be true in such manner and form as the same are therein alleged, do demur to the said bill, and for causes of demurrer say that the said bill, in case it were true, which defendant does in no wise admit, does not contain any matter of equity whereon this court can ground any decree or give the complainant any relief or assistance.

H. C. PINDELL, *D. D.*

I certify that in my opinion the above demurrer is well founded in point of law.

H. C. PINDELL.

25 And afterwards, to wit, on the 27th day of September, A. D. 1871, there issued the following alias subpœna in chancery:

Subpœna.

The President of the United States of America to the marshal of the Kentucky district, greeting:

You are hereby again commanded to summon J. Warren Grigsby, J. A. Grinstead, and S. M. Moore to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall in the city of Louisville, on the 1st Monday in November next, to answer a bill in equity exhibited against them in our said court by C. W. Purcell & Co., the president, directors, and company of the Farmers' Bank of Virginia, and William B. Isaacs & Co., which they shall in no wise omit, under the penalty of four hundred dollars.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, and the seal of our said court hereto affixed, at the clerk's office of our said court in Louisville, this 27th day of September, A. D. 1871, and in the ninety-sixth year of our Independence.

Attest:

[SEAL.] W. A. MERIWETHER, *C. C. C. K. D.*,
By SAM. B. CRAIL, *his Deputy.*

26 MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office on or before the 6th day of November next, the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

W. A. MERIWETHER, *Clerk*,
By SAM. B. CRAIL, *D. C.*

Upon which the marshal made the following return:

Marshal's return.

Executed by delivering to the within-named J. A. Grinstead a copy of this writ, this Sept. 28th, 1871.

ELI H. MURRAY, *U. S. M.*,
By M. F. ATHY, *Deputy.*

Order filing amended bill.

And at a term of our said court, held for its May term, A. D. 1871, to wit, on Thursday, September 28th, 1871, came the complainants, by W. O. Harris, their counsel. The complainants, by their counsel, by leave of court filed their amended bill of complaint herein.

Motion for injunction.

Thereupon the complainants, by their counsel, moved the court for an injunction as prayed for in their bill, and filed in support of said motion the affidavit of W. O. Harris and the *and the* notices and proofs of service thereof on the defendants, J. Warren Grigsby and J. A. Grinstead.

27 *Injunction.*

And the court being fully advised thereof, it is ordered and decreed that the defendant J. Warren Grigsby be, and he is hereby, enjoined and restrained from the collection, negotiation, or transfer, until the further order of the court, of the following-described notes, viz: 1st. A note of Henry E. Pickett for $9,750, dated Chicago, May 31st, 1870, payable two years after date to the order of Samuel J. Walker, and endorsed by said Walker. 2nd. A note of said Pickett dated Chicago, October 13th, 1870, for $7,500, with 6 per cent. interest, payable eighteen months after date. 3rd. Two notes of Bisan Philpot for $6,660 each, dated Chicago, Octo. 14, 1870, payable in one and two years respectively.

It is further ordered and decreed that the defendant J. A. Grinstead be, and he is hereby, restrained and enjoined, until the further order of court, from the collection, negotiation, or transfer of a note of Henry E. Pickett for $9,750, dated Chicago, May 31st, 1870, payable to the order of Samuel J. Walker, at the Second National Bank of Chicago, and one year after date, with 6 per cent. interest.

The amended bill above referred to is as follows:

Amended bill.

In the circuit court of the United States for the district of Kentucky.

28 C. W. PURCELL AND OTHERS } Amended bill.
vs.
J. WARREN GRIGSBY AND OTHERS. }

The complainants by leave of court amend their bill, and state that the estate of R. Pindell, who was trustee as set out in the original bill, is insolvent. And they pray as in their original bill.

W. O. HARRIS,
Sol. for Complainants.

Order setting demurrer for hearing.

And at another term of our said court, held for its October term, A. D. 1871, to wit, on Monday, October 2, 1871, came the complainants, by W. O. Harris, their counsel, and on their motion the demurrer to the bill of complaint herein is set for hearing on the first Monday in November next.

Order overruling demurrer.

And on another day of our said court, to wit, on Saturday, October 14th, 1871, came the complainants, by W. O. Harris, their counsel; came also the defendants, by Henry O. Pindell, their counsel, and by consent of parties, by their respective counsel, the demurrer theretofore
29 filed by the defendants was heard and submitted; and the court being sufficiently advised, it is ordered that the same be and it is hereby overruled.

And on another day of our said court, to wit, on November 6th, 1871, there issued the following process, viz:

Subpœna.

The President of the United States of America to the marshal of the Kentucky district, greeting:

You are hereby commanded to summon J. Warren Grigsby, J. A. Grinstead, S. M. Moore, E. H. Taylor, jr., and Isaac Shelley to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall in the city of Louisville, on the 1st Monday in December next, to answer a bill in equity and amended bill exhibited against them in our said court by C. W. Purcell & Co., the president, directors, and company of the Farmers' Bank of Virginia, and William B. Isaacs & Co., which they shall in nowise omit, under the penalty of four hundred dollars.

And have then there this writ.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, and the seal of our said court hereto affixed at the clerk's office of said court, in Louisville, this 6th day of November, A. D. 1871, and in the ninety-sixth year of
20 our Independence.

Attest:

[SEAL.] W. A. MERIWETHER,
C. C. C., K. D.,
By SAM'L B. CRAIL,
His Deputy.

MEMORANDUM.—The defendants, Taylor & Shelley, are to enter their appearance in the suit in the clerk's office on or before the 4th day of December next, the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

W. A. MERIWETHER, *Clerk*,
By SAM'L B. CRAIL, *D. C.*

Upon which the marshal made the following return:

Marshal's return.

Executed on E. H. Taylor, jr., November 20th, 1871, by delivering to him a true copy of the within ch'y sp'a; def't Shelley not found.

ELI McMURRAY, *U. S. M.*,
By JOHN WYATT, *Dep'y.*

Order filing plea of Grigsby.

And on another day of our said court, to wit, on Friday, October 27, 1871, came the complainants, by W. O. Harris, their counsel; came also the defendant, J. Warren Grigsby, by H. C. Pindell, his counsel. The said defendant by his said counsel filed his plea herein, and by consent of said parties said plea was heard upon its sufficiency, but the court, not being advised, takes time.

31 The plea above referred to is as follows:

Plea of J. W. Grigsby.

Circuit court of the United States for the sixth circuit and district of Kentucky.

C. W. PURCELL AND OTHERS, COMPL'TS, *vs.* J. W. GRIGSBY & OTHERS, DEFENDANTS. } Plea.

The defendant, J. W. Grigsby, protesting, &c., for plea to the matters contained in the bill herein, saith that on and before the 28th day of August, 1860, the plaintiffs, C. W. Purcell, were the holders of the bills of exchange herein sued on, and that so being holders of the same they entered into an agreement with Edmund H. Taylor and Isaac Shelley, the former partners of this defendant, to confess judgment on said bills of exchange; and that pursuant to said agreement the said Taylor & Shelley did, on the said 28th day of August, 1860, with the permission of Purcell & Co., appear in the Fayette circuit court, in the State of Kentucky, and there confess judgment in behalf of said Purcell & Co. on said bills of exchange herein sued on, for the sums of fifteen thousand four hundred & fifty-six $\frac{97}{100}$ dollars, with interest thereon at the rate of six per cent. per annum from Sept. 21st, 1857, till paid, also the further sum of seven thousand six hundred & fifty $\frac{85}{100}$ dollars,
32 with like interest thereon from October 1st, 1857, till paid, which said judgment was a merger and satisfaction of said bills of exchange. And the said defendant now here to the court showeth a certified copy of the record of said judgment. Wherefore he doth plead the same in bar to the said bill, and asks the judgment of the court whether he shall be compelled to make other and further answer to the said bill, and prays to be hence dismissed with his costs.

H. C. PINDELL,
For Defendant.

The certified copy above referred to is as follows:

Exhibit with plea.

STATE OF KENTUCKY:

Fayette circuit court.

Pleas held before the honorable William C. Goodloe, judge of the court of the circuit aforesaid, at the court-house in the city of Lexington, on the 28th day of August, 1860.

C. W. PURCELL & CO., PLAINTIFFS, *against* TAYLOR, SHELLEY & CO., DEFENDANTS. } On bills of exchange.

Be it remembered that heretofore, to wit, at a court continued and held for the circuit aforesaid on the 28 day of August, 1860.

33 C. W. PURCELL & CO., PLAINTIFFS,
against
EDMUND H. TAYLOR, J'R, ISAAC SHELLEY, & J. Warren Grigsby, partners as Taylor, Shelley & Co., defendants. } On bills of exchange.

The defendants, Edmund H. Taylor, j'r, and Isaac Shelley, personally appeared in open court, and with the assent of the plaintiffs and by permission of the court acknowledged themselves indebted to the plaintiffs in the sum of fifteen thousand four hundred and fifty-six $\frac{97}{100}$ dollars, with interest thereon at the rate of six per centum per annum from Sept. 21st, 1857, until paid. Also, the further sum of seven thousand six hundred and fifty $\frac{85}{100}$ dollars, with like interest thereon from October 1st, 1857, until paid, and six $\frac{24}{100}$ dollars due upon bills of exchange not filed herein.

The foregoing judgment is to be credited by the sum of twenty-one hundred and fifty-six $\frac{10}{100}$ dollars paid on the 20 day of February, 1859, and by the further sum of seven thousand five hundred dollars paid on the 13th day of March, 1860.

Wherefore it is adjudged by the court that the plaintiffs recover of the said Edmund H. Taylor, j'r, and Isaac Shelley the amounts aforesaid in manner and form as above acknowledged, and also their costs herein expended.

On the foregoing judgment the following execution issued herein, viz:

The commonwealth of Kentucky to the sheriff of Fayette County, greeting:

You are hereby commanded that of the estate of Edmund H. Taylor, jun'r, Isaac Shelley, and J. Warren Grigsby, partners as Taylor, Shelley & Co., late of your bailiwick, you cause to be made the sum of fifteen thousand four hundred and fifty-six $\frac{97}{100}$ dollars, with interest thereon at the rate of six per cent. per annum from the 21st day of September, 1857, until paid; also the further sum of seven thousand six hundred & fifty $\frac{85}{100}$ dollars, with like interest thereon from October 1st, 1857, until paid; and also six $\frac{25}{100}$ dollars, which C. W. Purcell & Co. late in our Fayette circuit court recovered against them; also $5.00, which to the said C. W. Purcell & Co. in our said court was adjudged for their costs by them about their suit in this behalf expended, whereof the said Taylor, Shelley & Co. are convict, as appears to us of record; and that you have the same before the judge of our said court, at the court-house
in Lexington, on the 4th Monday in December next, to satisfy
35 and *and* pay the said debt, int., and costs aforesaid; and have then there this writ.

Witness John B. Norton, clerk of our said court, at the court-house aforesaid, this 17th day of November, 1860, and *and* in the 69 year of the commonwealth.

Att.: JOHN B. NORTON, *C. F. C. C.*

(Endorsed:)

Cr. the within by $2,156 paid on the 20 February, 1859, & also by the further sum of $7,500, paid 13 March, 1860, as per judgment.

JOHN B. NORTON, *C.*

Sheriff's return.

Came to hand Nov. 17, 1869, at 9½ o'clock a. m. No property found out of which to make this fi. fa. or any part thereof.

J. C. COCHRAN, *D. S.*,
For JOS. R. GRASS, *S. F. C.*

STATE OF KENTUCKY,
Fayette Circuit, set:

I, Jo. B. Rodes, clerk of the court for the circuit aforesaid, do certify that the foregoing three pages contain a full, true, and complete transcript of the record and proceedings had in the case mentioned in the caption thereof.

Given under my hand this 14th day of August, 1871.

Atte.: J. B. RODES, *C. F. C. C.*

Order adjudging plea insufficient—order to amend bill.

36 And on another day of our said court, to wit, on Friday, November 3rd, 1871, this cause having been submitted to the court upon the sufficiency of the plea of the defendant Grigsby, and the court being sufficiently advised thereof, it is adjudged and ordered that the said plea is insufficient, and that said Grigsby answer herein on or before the next succeeding rule day; and it is further adjudged and ordered that complainants amend their bill by making E. H. Taylor, jr. and Isaac Shelley, who were partners with defendant Grigsby in the firm of Taylor, Shelley & Co., parties defendants to this cause.

Order filing amended bill.

And on Monday, November 6, 1871, came the complainants, by W. O. Harris, their counsel, and filed their amended bill herein, on which amended bill a subpœna in chancery issued returnable on the 1st Monday in December next.

Order taking bill for confessed vs. J. A. Grinstead.

On motion of the complainants, by their counsel, and the defendant, J. A. Grinstead, having failed to enter his appearance and answer the complainants' bill, it is ordered that the bill as to the defendant, J. A. Grinstead, be taken for confessed.

The amended bill above referred to is as follows:

Amended bill.

To the judges of the circuit court of the United States for the district of Kentucky:

37 C. W. Purcell and others, complainants in a bill heretofore filed against J. Warren Grigsby and others, by the order of court heretofore entered in this cause, so amend their said bill as to make E. H. Taylor, jun., of Frankfort, a citizen of the State of Kentucky, and Isaac Shelley, of South Danville, who is also a citizen of Kentucky, parties defendants thereto.

And thereupon they pray your honors to grant unto them the writ of subpœna directed to the said E. H. Taylor, jun., and Isaac Shelley, commanding them to appear herein and answer the said bill.

W. O. HARRIS,
For Complainant.

Order appointing W. A. Meriwether receiver.

And on another day of our said term of our said court, to wit, on Thursday, November 9, 1871, came the complainants, by W. O. Harris, their counsel, and moved the court to appoint William A. Meriwether a receiver, according to the prayer of the bill; and the court being sufficiently advised, it is ordered that the said Meriwether be, and he is hereby, appointed as such receiver; and then came the said Meriwether in person and consented to act as such receiver; and, on
38 motion of complainants, it is further ordered that the defendant, J. A. Grinstead, deliver to the said receiver the note in his possession, which is mentioned and described in the bill, and shall assign the same and make it payable to said Meriwether.

And on December 4th, 1871, came the defendant, J. Warren Grigsby, in proper person, and filed his answer herein.

The answer above referred to is as follows, viz:

Answer of J. W. Grigsby.

The answer of J. Warren Grigsby to a bill in chancery exhibited against him and others in the United States circuit court for the district of Kentucky:

Respondent, saving, &c., for answer to so much of said bill as he is advised it is necessary for him to answer, says it is not true that the firm of Taylor, Shelley & Co. was composed of E. H. Taylor, j'r, Isaac Shelley, and J. Warren Grigsby. Respondent says that for some time before the failure of said firm he, supposing that said firm was in a solvent and prosperous condition, was in negotiation with it to become a member thereof, and an arrangement of terms upon which, if
39 complied with, he was to become a member at a future time had come to be pretty well understood between the parties, when William Shause, one of the members of the old firm, became, by reason of certain involvements with his son, embarrassed in his pecuniary circumstances, and the other members of the firm applied to respondent to permit himself to be announced as a partner in place of said Shause to prevent injury to the business of the house growing out of Shause's embarrassment, but with the distinct understanding that respondent was not to become really a partner nor in any wise interested in its business except upon the terms of the old arrangement, and after they should be complied with.

Respondent further says that in pursuance of this arrangement he permitted himself to be held out to the people of Lexington, the place at which its business was transacted, as a partner of said firm. Before, however, the terms were complied with upon which he was to become a member of the firm, the Ohio Life and Trust Co. failed, and the memorable crash of 1857 came on, in which the said firm, with so many others, was ruined, and in consequence thereof the terms of the arrangement with this respondent were never complied with, and he never was anything more than a nominal partner thereof. Respondent says
40 that the said Theodore Johnston, at the time of the purchase of said bills of exchange sued on in the bill herein, and at the time the debt was contracted, in payment of which they were given, was a resident of the city of New Orleans, and that the firm of C. W. Purcell & Co., and all its members, and the president and directors of the Farmers' Bank of Virginia were at the time they purchased said bills

of exchange residents of the State of Virginia, and all of said parties were strangers in the city of Lexington. And respondent denies that either of said parties at the time the said debt was contracted, and the said bills sued on were purchased, knew anything of this respondent, or of his having previously allowed himself to be announced as a partner of the firm, or that they were at all influenced in the purchase of said bills by the credit of this respondent.

Respondent further says that after the failure of the said firm the said Taylor & Shelley, who were the only real partners thereof, pledged themselves to this respondent to use every exertion to relieve him from every shadow of responsibility, by reason of his having been announced as a member thereof, and accordingly they have in one way or another settled, secured, or compromised much the larger portion of its
41 liabilities, and in every instance have in some form or other arranged for the release of this respondent. That on the 4th day of August, 1860, the said C. W. Purcell owned and had the control of all the said bills of exchange herein sued on, and that on the said day the said Taylor & Shelley entered into an arrangement with the said Purcell, according to which they confessed judgment in his favor on said bills, and secured the said judgment by assigning to him a large amount of good collaterals, which, if they had been properly managed and pressed for collection, would have been sufficient to pay off the same; and respondent understands, believes, and charges that it was the intention and understanding of the parties to the arrangement that the said judgment and security were to be a full satisfaction of said bills of exchange and release of this respondent from all claim on, if any such existed. The said judgment was confessed in the Fayette circuit court, in this State, with the consent of said Purcell, for the sum of fifteen thousand four hundred and fifty-six $\frac{97}{100}$ dollars, with interest thereon at the rate of six per centum per annum
42 from the 21st day of September, 1857, till paid; also the further sum of seven thousand six hundred and fifty $\frac{55}{100}$ dollars, with like interest thereon from October 1st, 1857, till paid; all of which appears from a duly certified copy of the record of said judgment on file in this case and now made part hereof, and the same was a merger of pl'ff duties.

This respondent further pleads and relies on lapse of time and the statute of limitations in bar of all relief sought on the said bills of exchange, the cause of action having accrued more than five years before the commencement of this suit.

This respondent, further answering, admits the sale to Samuel J. Walker, as set forth in said bill, and this respondent is in possession of the notes therein mentioned as being in possession of this respondent. Respondent says that at the time of said sale to Walker, the debts secured by his said deed of assignment to R. Pindell in the first class had never been settled. That Susan P. Grigsby, the wife of this respondent, was at the time of said assignment, and still is, possessed of considerable estate settled to her sole and separate use, and that with the proceeds of said separate estate she had purchased the said
43 first class debts. That, as agent of his said wife, respondent had control of the whole of said first-class debt. That upon a computation made at the time of said sale to Walker it was ascertained that the said first-class debt amounted to the sum of nearly $50,000, but that said Pindell was anxious to secure the 2d-class creditors a larger amount than would be coming to them of the proceeds of said sale if the first-class debts should be paid in full, and this respondent was anxious to

be released from all responsibility on the said class debts, and an arrangement was entered into between the said Pindell and respondent, under which the said Pindell consented to join in said sale to Walker, and endeavor to procure the fourth-class creditors to release respondent, and respondent agreed that the note placed in the hands of Grinstead, as set forth in the bill, should be applied to the payment of the fourth-class creditors, except Chenault & Co., and that so much of the note placed in the hands of Moore as might be necessary for that purpose should be applied to the payment of the expenses of the trust, the commissions of the assignee, and so much as Chenault & Co. might be entitled on a final settlement, if that claim was not made out of other funds
44 primarily liable therefor, and the remainder to be applied to the first-class creditors, and that this respondent should receive such remainder, and the notes delivered to him, and pay off and satisfy the first-class debts; and if he should be released from the fourth-class debts he agreed not to call for anything more than said balance and notes on account of the first-class debts, unless there should be a balance left after satisfying the fourth-class creditors. Neither of the parties had any idea of the amount of fourth-class debts remaining unsettled.

Respondent alleges that said arrangement, so far from being fraudulent, was especially beneficial to the fourth-class creditors as well as to this respondent, and such a one as the assignee had a right to make, and he is willing that the same be carried out and enforced if the fourth-class creditors concur in it, otherwise he prays that the 1st-class creditors be paid in full.

Respondent is advised that it is unnecessary for him to make any further discovery as to what he has done with the said notes placed in his hands under the arrangement with said R. Pindell, ass'ee, until the defences herein are heard by this honorable court, and not then unless said decision is adverse to respondent.

45 Respondent submits this question to the decision of the court, protesting his willingness to make the most unreserved disclosures in regard to all matters in relation to which this court shall decide that it is proper for him to answer in regard to.

And having fully answered, respondent prays to be hence dismissed with his costs, &c.

J. WARREN GRIGSBY.
H. C. PINDELL,
For Defendant.

Sworn to before me this 1st day of December, 1871, by J. W. Grigsby.

W. A. MERIWETHER, *Clerk.*

The alias process above referred to is as follows:

Subpœna.

The President of the United States of America to the marshal of the Kentucky district, greeting:

You are hereby again commanded to summon J. Warren Grigsby, J. A. Grinstead, S. M. Moore, E. H. Taylor, j'r, and Isaac Shelley to appear before our circuit court of the United States of America for the district of Kentucky, at the federal court hall in the city of Louisville, on the 1st Monday in January next, to answer a bill in equity exhibited against him in our said court by C. W. Purcell & Co., the president, directors,

46 and company of the Farmers' Bank of Virginia, and William B. Isaacs & Co., which they shall in nowise omit under the penalty of four hundred dollars.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, and the seal of our said court, hereto affixed, at the clerk's office of our said court in Louisville, this 4th day of December, A. D. 1871, and in the ninety-sixth year of our Independence.

Attest:
[SEAL.]

W. A. MERIWETHER,
C. C. C., K. D.,
By SAM'L B. CRAIL, *Deputy.*

MEMORANDUM.—The defendant is to enter their appearance in the suit in the clerk's office on or before the 1st day of January next, the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

W. A. MERIWETHER, *Clerk,*
By SAM'L B. CRAIL, *D. C.*

Upon which the marshal made the following return:

Marshal's return.

Executed by delivering a copy of the within to Isaac Shelley Dec'r 16, 1871.

ELI H. MURRAY, *U. S. M.,*
By JNO. WYATT, *Deputy.*

47 And afterwards, to wit, on January 1st, 1872, came the complainants, by W. O. Harris, their counsel, and filed their exceptions to the answer of J. Warren Grigsby.

And thereupon came the defendant, Isaac Shelley, by Jno. M. Harlan, his counsel, and entered his appearance herein.

The exceptions above referred to are as follows:

Exceptions to Grigsby's answer.

Circuit court of the United States for the district of Kentucky.

C. W. PURCELL AND OTHERS, COMPL'TS,
vs.
J. WARREN GRIGSBY AND OTHERS, DEF'TS.
} Exceptions to answer of Grigsby.

Complainants, C. W. Purcell and others, except to the relevancy and sufficiency of the answer of the defendant J. Warren Grigsby, and assign the following grounds:

1st. The allegations of said answer to the effect that defendant Grigsby was a nominal partner in the firm of Taylor, Shelley & Co., and that at the time of the purchase of the bills of exchange mentioned
48 in their bill complainants did not know the fact that he permitted himself to be held out to the world as a partner, and did not purchase said bills on the faith of such holding out, are irrelevant and insufficient to interpose any bar to the relief sought by complainants.

2nd. The allegations of said answer to the effect that def't's copartners in the firm of Taylor, Shelley & Co. undertook and pledged themselves

preme Court of the United States of America, and the seal of our said court, hereto affixed, at the clerk's office of said court in Louisville, this 3rd day of January, A. D. 1872, and in the ninety-sixth year of our Independence.

[SEAL.] W. A. MERIWETHER, *C. C. C., K. D.*,
By SAMUEL B. CRAIL, *his Deputy.*

Upon which the marshal made the following return:

Marshal's return.

Executed by delivering a copy of the within s'p'a to A. O. Harris, attorney.

E. H. MURRAY, *U. S. M.*,
By HENRY DIVEN.

The plea of E. H. Taylor, above referred to, is as follows:

Plea of E. H. Taylor.

Circuit court of the United States for the district of Kentucky.

The plea of Edmund H. Taylor to a bill in chancery exhibited against him and others in this honorable court, by C. W. Purcell, the president, directors, and company of the Farmers' Bank of Kentucky, David J. Saunders, and William B. Isaacs & Co.

The defendant, Edmund H. Taylor, says that on the day of
55 he exhibited his petition in the district court of the United States for the district of Kentucky to be declared a bankrupt according to the provisions of the United States bankrupt law then in force, and that upon proper proceedings had thereon he was duly declared a bankrupt, and that on the day of a discharge from all his debts was by said court granted to him, as more fully appears from a copy thereof filed herewith as part hereof.

Wherefore he pleads the same in bar to the said bill, and asks the the judgment of the court whether he shall be compelled to make other and further answer to the said bill, and prays to be hence dismissed with his costs.

H. C. PINDELL,
For Taylor.

The discharge of E. H. Taylor, above referred to, is as follows:

Exhibit with plea.

In the district court of the United States for the district of Kentucky, at Louisville, Friday, July 17, 1868. In bankruptcy.

In the matter of Edmund H. Taylor, bankrupt.

Whereas Edmund H. Taylor, jr., has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bank-
56 ruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by court that said Edmund H. Taylor be forever discharged from all debts and claims which by said act are made provable against

his estate, and which existed on the 29th day of February, eighteen hundred and sixty-eight, on which day the petition for adjudication was filed, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

A true copy. Witness my signature this 4th day of January, A. D. 1872.

[SEAL.]

W. A. MERIWETHER, *Clerk*,
By H. S. IRWIN, *D. C.*

And on another day of our said court, to wit, on Friday, January 12, 1872, came the complainants and the defendant, J. Warren Grigsby, by their respective counsel, and by consent the exceptions to the answer of said Grigsby were heard and submitted to the court.

Order filing amended answer of Grigsby.

And the said defendant Grigsby tendered his amended answer, to the filing of which the complainants objected, and the court being fully advised, said objection was overruled, and said amended answer
57 was allowed to be filed; to which ruling of the court the complainants excepted.

The amended answer above referred to is as follows:

Amended answer of Grigsby.

Circuit court of the United States for the district of Kentucky.

The amendment of J. Warren Grigsby to his answer heretofore filed in the suit in chancery in this court in which C. W. Purcell and others are plaintiffs and J. W. Grigsby are defendants.

Respondent says that during the late war and while the bills herein sued on were the property of the Farmers' B'k of Virginia, as respondent is informed and charges, his co-defendant, E. H. Taylor, tendered payment of said debt to George B. Kinkead, who was at the time a loyal citizen of the United States, residing within the Federal lines, and who was then the agent and attorney of the said bank and authorized to collect said debt, said payment was tendered in the circulating notes of the said bank, which were a legal tender to the said bank. That said Kinkead refused to receive the said payment, and that at the request of said Kinkead the said notes were specially deposited at the Northern Bank of Kentucky, at Lexington, till said Kindead could hear
58 from the managing officers of said bank. And afterwards, after hearing from said officers, said Kinkead again declined to receive the said notes in payment of said debt.

Respondent pleads and relies on said refusal of said tender in bar of this suit and prays as in his original answer.

H. C. PINDELL, *P. D.*

Subscribed and sworn to before me this 12th day of January, 1872.
W. A. MERIWETHER
U. S. Com'r.

Order of court on exceptions to Grigsby's answer.

And on another day of our said court, to wit, on Wednesday, February 7, 1872, the court being now fully advised of and concerning the exceptions of the complainants to the answer of J. W. Grigsby, it is

ordered and decreed that the first, second, & sixth exceptions be sustained, and the court, not being advised as to the third, fourth, and fifth exceptions, takes time.

And at another term of our said court, held for its February term, 1872, to wit, on Saturday, March 2d, 1872, this cause having been reheard and submitted upon the exceptions to Grigsby's answer relating to the statute of limitations and discovery, it seems to the court that the plea of statute is bad in so far as it sought to interpose a bar
59 to the right of the complainants to recover from Grigsby and subject the notes alleged in the bill to be in his possession, but that the plea is good so far as it is interposed as a bar to the right of complainants to recover a personal judgment against Grigsby. This exception is therefore overruled.

And it seems further to the court that the exceptions to the answer for the want of sufficient discovery is well taken. It is therefore ordered that said exception be sustained, and that the defendant answer, making further and complete discovery as to the matters referred to in the exception.

And on another day of our said court, to wit, on Monday, April 1st, 1872, came the defendant Samuel M. Moore, and filed his answer herein. The answer above referred to is as follows, to wit:

Answer of Sam'l M. Moore.

UNITED STATES OF AMERICA,
District of Kentucky, ss:

In the circuit court of the United States for the district of Kentucky.
In chancery.

The separate answer of Samuel M. Moore, of Chicago, a citizen of the State of Illinois, to the bill of complaint filed against him and J. Warran Grigsby and J. A. Grinstead in the circuit court of the United
60 States in and for the district of Kentucky, by C. W. Purcell et al., citizens and residents of the State of Virginia.

This defendant now comes, &c., saving, &c., reserving, &c., excepting, &c., and for answer to said bill, or to so much thereof as he is advised it is material for him answer, says it may be true that his co-defendants made and delivered the deed of assignment to R. Pindell, described in said bill, and it may be true that the complainants have in their bill properly described the contents of said deed. This defendant has not said deed, and does not know its contents, and requires the same to be produced for the inspection of the court, and requires full proof of the contents thereof in so far as the same may be prejudicial to the rights of this defendant.

This defendant, further answering, says he knows nothing about any indebtedness by Taylor, Shelby & Co. to the complainants, or any or either of them. This defendant does not know, and therefore does not admit, but requires proof that the complainant, David J. Saunders, has been appointed receiver of the Farmers' Bank of Virginia. This defendant does not know that Richard Pindell was attorney
61 for complainants, or any or either of them, or that he failed to report to the proper parties any sales or conveyances he may have made under the power vested in him by virtue of the aforesaid

deed of assignment, or that the complainants did not receive their full share of the proceeds, and of the averments in the bill in relation to those matters this defendant requires strict proof.

This defendant, further answering, says true it is that Pindell did make the conveyance described in the bill to H. H. Walker, reciting therein a consideration once well known but now forgotten by this defendant but supposed to be fifty thousand dollars; that at the time this defendant was quite familiar with the price and the mode in which it was paid or secured to be paid; that since then, and since the bill in this case was filed, his law-office, together with his safe and contents, and including all his papers and memoranda, and all papers, bills, notes, accounts, &c., belonging to his clients have been burned and destroyed; that he is entirely without data by which to refresh his memory; that he
62 remembers one of three notes made by Pickett and described in the bill was received by this defendant from S. J. Walker, and delivered to his co-defendants, James A. Grinstead, and another was delivered to defendant Grigsby, and another was retained in the custody of this defendant; that all this was done by the direction of Richard Pindell and the defendant Grigsby; that the recollection of this defendant is that there was left in his custody the note for nine thousand seven hundred and fifty dollars, maturing in either two or three years from its date; that said note so left with defendant was destroyed in his safe in the Chicago fire of October 8th and 9th, 1871, and this defendant cannot therefore deliver the same to any one; that said note is in effect in his custody, and under his control; that the same was and is so under his control subject to the instructions of said R. Pindell and defendant Grigsby; that the same was subject to the joint order of said Pindell and said defendant Grigsby; that this defendant has no interest in said note saving and excepting any lien he may have thereon for the professional services of the law firm of Moore & Caulfield rendered in that behalf, &c. This defendant is ready to do what and as
63 the court may direct after a final hearing of this cause. He asks that the court protect him in the premises.

And this defendant denies all and all manner of unlawful combinations and confederacy wherewith he is by the said bill charged without this, that there is any other matter, cause, or thing in the said complainants' said bill of complaint contained material or necessary for this defendant to make answer *onto* and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, *in* true to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable cost and charges in this behalf sustained, &c.

S. M. MOORE.

MOORE & CAULFIELD,
Solicitors, and of Counsel for Defendants.

UNITED STATES OF AMERICA,
State of Illinois:

COUNTY OF COOK,
City of Chicago:

64 Samuel M. Moore, the defendant in the above-entitled case, being duly sworn, on oath says he has read and signed the foregoing answer, and so far as the statements in said answer are made of his own

knowledge, they are true, and those that are made upon information and belief he believes them to be true.

S. M. MOORE.

Subscribed and sworn to before me by Samuel M. Moore. Witness my hand and official seal as notary public in and for the city aforesaid this the 22d day of March, A. D. 1872.

WILLIAM J. O'NANAY,
Notary Public.

And on another day of our said term of our said court, to wit, on Monday, April 8th, 1872, came the complainants, by W. O. Harris, their counsel, and filed their answer to the cross bill of J. W. Grigsby herein. The answer above referred to is as follows:

Answer of compl'ts to cross-bill of Grigsby.

In the circuit court of the United States for the district of Kentucky.

65 The joint and several answer of C. W. Purcell, the president, directors, and company of the Farmers' *Farmers'* Bank of Virginia, by David I. Saunders, receiver, William B. Isaacs, William G. Taylor, and John O. Williams, to the cross-bill of J. Warren Grigsby, exhibited against them in this cause.

These defendants, now and at all times heareafter reserving a*nd* manner of benefit and advantage to themselves of exception to the many errors and insufficiences in said bill contained, for answer thereto or unto so much or such parts thereof as these defendants are advised it is material for them to answer unto, they answer and say—

1st. They deny that at the time the judgment was confessed by Taylor and Shelby in favor of O. W. Purcell & Co. in the Fayette circuit court any notes, acceptances, or collaterals of any kind or description whatever, *even* assigned by said Taylor and Shelby to said Purcell & Co. for the purpose of securing the said judgment or for any other purpose.

They say that the said judgment was intended by the parties and was in fact a solemn declaration of the amount then due by said Tay-
66 lor, Shelby, & Co. to said Purcell & Co. and said Farmers' Bank, and neither at that time nor since have any collaterals of any description been assigned to those defendants or any of them as security therefor, nor is the same entitled to any credit, except as is expressed on its face.

2nd. And for further answer, defendants deny that said J. Warren Grigsby was ever really a partner in said firm of Taylor, Shelby & Co., and that the only reason for holding him responsible for its debt is that he did on one occasion represent himself to the people of Lexington as a member thereof.

They aver that on the 11th day of July, 1857, William Shause, who then with Taylor and Shelby composed said firm, retired therefrom, and on the 14th J. Warren Grigsby became a member thereof, and the*n* facts were published by advertisements in the Observer and Reporter, a newspaper published in the town of Lexington, in each issue there*for* from the 18th day of July to the 30th day of December, 1857.

And defendants further say that when they purchased the bills of exchange sued on in this cause, the name of said Grigsby ap-
67 peared upon said bills as a member of said firm of Taylor, Shelby

& Co., being written over that of William Shause, which was printed across one and thereof, together with the names of said Taylor and Shelby, which facts appear from the record, and defendants gave as much faith and credit to said Grigsby as to any other member of said firm, so far as they are able to remember after so great a lap'e of time.

Wherefore, after having fully answered said cross bill defendants pray that it may be dismissed with costs.

C. W. PURCELL.

W. O. HARRIS, *Solicitor.*

This day personally appeared before me *in* the above-named Cha's W. Purcell, and subscribed his name to this answer, and having been first duly sworn made oath that so far as the same related to his own acts it is true, and so far as it related to the acts of others he believes it to be true.

Witness my hand and official signature this 2d day of April, 1872.

[SEAL.] CHESTER SHEPHERD, *N. P.*

STATE OF VIRGINIA,
Allemarle County, to wit:

I, H. B. Burnley, clerk of Allemarle County court, do hereby
68 certify that Chester Shepherd, whose genuine signature is attached to the foregoing *signature*, is a duly commissioned notary public in this county.

Given under my hand as clerk of the county court of the county aforesaid with the seal of the county attached.

H. B. BURNLEY, *Clerk.*

VIRGINIA,
Allemarle County, to wit:

I, John L. Cochran, judge of Allemarle County court, do hereby certify that H. B. Burnley, whose name is signed to the within certificate, is clerk of said court, and that his actions as such are entitled to full faith and credit.

JNO. L. COCHRAN.

Order of court.

And on another day of our said court, to wit, on Saturday, April 27th, 1872, came the complainants, by W. O. Harris, their counsel, and on his motion it is ordered that the defendant, J. Warren Grigsby, turn over to the receiver, W. A. Meriwether, the notes in his possession, which are described as follows, viz: One note of Henry E. Pickett, for $9,750, dated Chicago, May 31st, 1870, payable two years after date. One note
of said Pickett for $7,500, dated Chicago, Oct. 13, 1870, payable
69 18 months after date; and two notes of Brean Philpot, for $6,660 each, dated Chicago, Oct. 14th, 1870, payable in one and two years respectively after date.

And it is further ordered that the defendant Samuel M. Moore shall relinquish to the said receiver the right to collect the amount due on the note of Pickett for $9,750 dated Chicago, May 31st, 1870, payable three years after date, which was in the possession of the said Moore at the time of its destruction by fire. And it is ordered that said receiver proceed to collect the notes entrusted to him by this order as they shall severally fall due.

This order shall not operate to prejudice any claim the said Moore may have upon the proceeds of said note.

And on Monday, May 6th, 1872, came the complainants, by W. O. Harris, their counsel, and on his motion it is ordered that the bill of complaint as to the matters embraced in their exceptions to the answer of the defendant J. Warren Grigsby be taken for confessed.

On like motion this cause is set for hearing on the bill and answer & amended answer of said Grigsby, and the answer of Sam'l M. Moore.

70 And on another day of our said term of our said court, to wit, on Wednesday, June 19, 1872, came the complainants, by their counsel, and on their motion it is ordered that the order made at rules setting this cause for hearing on bill and answer be set aside as to the defendant Grigsby. And thereupon, by leave of court, they filed their replication to the answer and amended answer of said defendant Grigsby to have the same effect as if filed within the time required by the rules of this court.

The replication above referred to is as follows:

Replication.

Circuit court of the U. S., district of Kentucky.

The replication of C. W. Purcell & others, complainants, to the answer and amended answer of the defendant J. Warren Grigsby.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer and answer of the said defendant, for replication thereunto, saith, that they do and will aver, maintain, and prove their said bill to be true, certain,
71 and sufficient in the law to be answered unto by the said defendant, and that the answer & *and* answer of the said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this repliant; without that any other matter or thing in the said & *and* answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed, is true, all which matters and things these repliants are ready to aver, maintain, and prove, as this honorable court shall direct, and humbly pray, as in and by their said bill they have already prayed.

W. O. HARRIS,
For Compl'ts.

Order of court.

And at another term of our said court held for its October term, 1872, to wit, on Tuesday, November 26, 1872, this cause coming on this day for hearing was heard in part, and ordered to stand over for further argument.

Order of court.

And on another day of our said court, to wit, on Saturday November 30, 1872, came the defendant J. Warren Grigsby, by H. C. Pindell, his counsel, and it appearing to the court by the verbal statement of
72 said Pindell that the order of submission entered in this cause on the 26th day of November inst., was agreed to by him under

a mistaken impression of the orders previously entered in the cause on motion of said Grigsby, it is ordered that said order of submission be set aside.

The defendant Grigsby also moved the court to file an amended answer, which motion being objected to, was heard and the motion overruled.

And then came complainants, by their counsel, W. O. Harris, and moved that this cause be heard and submitted, which motion was objected to by defendants and motion submitted.

Order of court.

And on another day of our said term of our said court, to wit, on Saturday, January 4, 1873, this cause coming on to be heard on the 3d day of December, upon the motion of defendant Grigsby to extend the time for taking proof, and upon the motion of complainants to submit the cause for final hearing, and having been argued by counsel upon both motions and in chief, and court being now sufficiently advised, doth order and decree that the motion to submit the cause for final hearing be, and the same is, sustained. And upon the hearing and submission of the cause in chief upon the pleadings and exhibits on file in the
73 original and cross causes between the parties, it is adjudged that this cause be referred to James A. Beattie, the master commissioner of this court, to take an account of what is due to complainants and all other creditors under the deed of trust from Grigsby to Pindell, which is filed with complainants' bill, and to compute interest on such debts as carry interest, and to this end said matter is directed to cause an advertisement to be published in the daily Lexington Press and the daily Louisville Commercial for five consecutive days, requiring said creditors to appear before him within thirty days and prove their debts, in default of which appearance and proof of debt they shall be excluded from the benefit of this decree, and such persons so coming in before allowed the benefit of this decree shall be required by the master to contribute to the costs of this suit in proportions to be settled by him, and in ascertaining what is due complainants, the master may take such proof as may be offered by the respective parties touching the alleged assignment of good collaterals referred to in the answer of Grigsby, but not respecting the alleged tender or other matter of defense.

Said master is directed to report upon a reasonable fee to be
74 allowed to complainants' counsel out of the fund in court, and upon the amount of any such fund and its distribution.

This cause is retained for further order upon the coming in of said report.

Order of Court.

And on another day of our said term of our said court, to wit, on Wednesday, February 12th, 1873, it is ordered that the time for creditors to prove their debts before James A. Beattie, master commissioner, under the decree herein, be extended three weeks from the 14th day of February instant.

And at another term of our said court, held for February term, 1873, to wit, on Wednesday, February 19, 1873, came J. W. Grigsby, by F. T. Fox, his attorney, and moved the court to allow him a fee for his services as trustee for the various parties under the deed of trust.

Order of court.

And on another day of our said term of our said *term*, to wit, on Thursday, March 6th, 1873, it is ordered that the time for creditors to prove their debts before James A. Beattie, master commissioner, under the decree herein, be extended two weeks from the 7th day of March instant.

And on another day of our said court, to wit, on Friday, July 24th, 1874,

75 *Master com'r's report.*

In the circuit court of the United States for the sixth circuit and district of Kentucky, at Louisville.

C. W. PURCELL ET ALS., COMPLAINANTS,
vs.
J. W. GRIGSBY ET ALS., DEFENDANTS. } Master commissioner's report.

To the honorable the judges of the circuit court of the United States for the sixth circuit and district of Kentucky, at Louisville.

May it please your honor: By decree entered the 4th day of January, A. D. 1873, the above-entitled cause was referred to the undersigned, as "the master commissioner of the court, to take an account of what is due to complainants and all other creditors under the deed of trust from Grigsby to Prudell, which is filed with complainants' bill, and to compute interest on such debts as carry interest; and to this end said master is directed to cause an advertisement to be published in the daily Lexington Press and the daily Louisville Commercial for five consecutive days, requiring said creditors to appear before him within thirty days and prove their debts, in default of which appearance and proof of debt they shall be excluded from the benefit of this decree; and

76 such persons so coming in, before being allowed the benefit of this decree, shall be required by the master to contribute to the costs of this suit in proportions to be settled by him; and in ascertaining what is due complainants the master may take such proof as may be offered by the respective parties touching the alleged assignment of good collaterals refer'ed to in the answer of Grigsby, but not respecting the alleged tender or other matter of defense. Said master is directed to report upon a reasonable fee to be allowed to complainants' counsel out of the fund in court and upon the amount of any such fund and its distribution."

A duly certified copy of the said decree is hereto annexed as part hereof.

I now respectfully report that on the 14th day of January, A. D. 1873, and on four consecutive days thereafter, as appears by the affidavits of Henry Harney and of James J. Dillon, herewith returned, I cause' to be published in the said daily Lexington Press and in the said daily Louisville Commercial, in obedience to said decree, a notice of which the following is a copy, viz:

NOTICE.

United States circuit court, district of Kentucky, at Louisville.

C. W. PURCELL & CO. ET AL.
vs.
J. WARREN GRIGSBY ET AL. } No. 2001.

77 In obedience to a decree in the above-entitled cause the creditors of J. Warren Grigsby and of Taylor, Shelby & Co., under the

deed of trust from said Grigsby to R. Pindell, dated December 10, 1857, and exhibited with the bill of complaint in said cause, are hereby required to appear before me at my office, No. 204 West Jefferson street, in the city of Louisville, within thirty days from the date hereof, and prove their debts; in default of which appearance and proof of debt they will be excluded from the benefit of said decree.

JAMES A. BEATTIE,
Master Commissioner.

LOUISVILLE, K'Y, *January 14th*, 1873.

By order of the 12th day of February, A. D. 1873, the time for proving debts under the above decree was extended for three weeks from the 14th day of February, A. D. 1873; and by order of the 6th day of March, A. D. 1873, such time was still further extended for two weeks from March 7, A. D. 1873; certified copies of said orders are hereto annexed.

On the 29th day of January, A. D. 1873, on motion of the defendant, J. Warren Grigsby, by his then counsel H. C. Pindell, esquire, I ordered the deposition of E. H. Taylor, j'r, might be taken before D. W. Lindsey, esquire, a commissioner of this honorable court, resident at Frankfort, on reasonable notice to be given to W. O. Harris, esquire,
78 counsel for complainants, of the time and place of taking the same; and further, that proofs of the debts mentioned in the decree in this cause, and secured by the deed of trust exhibited with the bill of complainant therein, might be taken before and by any officer authorized by law to take depositions to be read in the courts of the United States; and on the same day, at the suggestion of W. O. Harris, esquire, counsel for the complainants, I modified the said order, by ordering that the proofs of debt therein mentioned might be by affidavit; provided that any party in interest might, should he so desire, require any of the affiants to attend before the master for examination. Said order and the modification thereof are herewith returned.

Under the foregoing orders five complainants have filed proofs of debt before me, to wit:

February 12th, 1873, M'r's Susan P. Grigsby, wife of the defendant, J. Warren Grigsby, filed her sworn state of facts, with nine other papers in support thereof, filed on the same day, and a tenth paper filed March 3rd, 1873.

To M'r's Grigsby's state of facts complainants filed a counter-state of facts December 23d, 1873.

March 6th, 1873, complainants proved their debt by exhibiting before and filing with me the three bills of exchange evidencing
79 their demand and exhibited with their bill of complaint herein.

This claim is supported by other exhibits filed with the bill, and by exemplified copies of the record in the case of Charles W. Purcell et al. against R. B. Millikin, and of the execution issued in the said case lately pending in the superior court of the city of New York, which last two named papers were subsequently filed before me by complainants, the first-named thereof with the third deposition of E. H. Taylor, jr., herein.

To this claim of complainants, one of the claimants, R. Apperson, jr., has by his counsel, H. C. Pindell, esquire, interposed the plea of the statute of limitations by a written plea filed before me March 26th, 1873.

March 22nd, 1873, R. Apperson, jr., filed his sworn state of facts supported by three other papers.

To this state' of facts of Apperson complainants filed a counter-state' of facts December 23rd, 1873.

January 31st, 1873, W. H. Thomas filed his sworn state' of facts with five other papers in support thereof.

On the 13th day of December, 1873, complainants, by W. O. Harris, esquire, their counsel, moved before me to exclude from the cause W. H. Thomas' state' of facts, and that said Thomas be required to
80 prove his debt orally under oath before the master, which motion I overruled. December 31st, 1873, complainants filed a counter-state' of facts on the claim of W. H. Thomas.

March 21st, 1873, Virginia Wilson and others, heirs of William Shouse, deceased, filed a sworn state' of facts, with one other paper in support thereof, to which state' of facts complainants filed a counter-state' of facts December 23, 1873.

The following depositions have been taken under the order of reference, viz: Those of Susan P. Grigsby, H. C. Pendell, W. O. Harris, and G. B. Kinkead, for complainants, and one of J. Warren Grigsby for same, and one of said Grigsby, on additional cross interrogatories claimant H. H. Thomas, and two of E. H. Taylor, jr., one taken for defendant Grigsby, and one for claimant W H. Thomas.

April 25th, 1874, complainants filed exceptions to portions of the deposition of E. H. Taylor, taken Oct. 21st, 1872, and of his deposition taken March 20th, 1874, and also to the reading of any affidavits in evidence.

December 23rd, 1873, W. H. Thomas filed exceptions to so much of the deposition of J. W. Grigsby as appears to be founded on hearsay, and so much thereof as purports to state the substance of records or writings of any description.

May 2, 1874, the parties filed before me an agreement in writ-
81 ing that certain copies thereover written are true copies of advertisements published in the Lexington Observer & Reporter, at their respective dates, and for several days thereafter, and might be introduced in this case as evidence thereof.

All of the said papers hereinbefore referred to are herewith returned.

On the 23rd of April, 1873, I issued a warrant appointing Saturday, the 25th of April, 1873, at 3 o'clock p. m., at my office in Jefferson street in the city of Louisville, to consider of the matters referred to me in this case, and calling on the parties concerned to attend at the said time and place, copies of which warrant were duly served on the counsel of the several parties in interest, and which warrant is herewith returned.

On the said Saturday, and on several other days thereafter, the counsel of the respective parties attended before me at my said office, and made their statements and arguments respecting the matters and things embraced by the order of reference.

Before investigating the particular facts in regard to the several claims presented before me as above stated, it will be well, perhaps, to state some of the more general facts disclosed in the cause.

Taylor, Shelby & Co. were bankers, carrying on business in the
82 city of Lexington in the State of Kentucky. For some time prior and up to the 11th day of July, 1857, the firm was composed of E. H. Taylor, Isaac Shelby, and William Shouse, the latter since deceased. On that day the firm was dissolved, William Shouse withdrawing, and the following notice of the dissolution was published in the Lexington Observer & Reporter, a newspaper published in Lexington, Kentucky, viz:

The firm of Taylor, Shelby & Co. is this day dissolved by mutual consent. William Shouse withdrawing.

(Signed) E. H. TAYLOR.
ISAAC SHELBY.
WILLIAM SHOUSE.

JULY 11, 1857.

On the 14th day of July, 1857, the defendant, J. Warren Grigsby, became a partner in the house; and on that day publication was made in the same newspaper of the following notice, viz:

The undersigned have this day formed a partnership, and will continue the business of the old house under the same name.

(Signed) E. H. TAYLOR.
ISAAC SHELBY.
J. WARREN GRIGSBY.

LEXINGTON, KY., *July* 14, 1857.

Both of these notices appeared in the said paper for several days after their respective dates.

The defendant, Grigsby, continued to be a partner in the firm
83 so formed, at least as to creditors, for something over two months; when the firm suspended payment, failed in business, and it and the individual members thereof became insolvent and unable to pay their debts.

Under these circumstances, the defendant, J. Warren Grigsby, of Lincoln County, Kentucky, on the 10th day of December, 1857, made to R. Pindell, of Lexington, a deed of trust of certain real estate therein described, in Cook County and the city of Chicago, Illinois, in trust, to secure consecutively five classes of debts of the said Grigsby, therein respectively specified, investing the said Pindell, trustee, with power to control the trust-property, and to sell and convey it and apply the proceeds to the payment of the debts specified in the trust-deed. The property conveyed by this deed has been sold, and a large proportion of the proceeds, consisting of money and bonds for the purchase-money, have been taken possession of by the court in this cause, and are now under its control, and from the subject-matter of the litigation between the five claimants who have appeared before me and filed proofs of debt, as required by the decree.

Of the five classes of debts set forth in the deed of trust, we have only to do with the first, to which the claims presented by M'r's Grigsby belong; and with the fo'rth, in which the other debts presented are claimed by their respective holders to rank.

84 This leads us to the consideration of the claims presented by M'r's Grigsby, and which belong to the first class specified in the deed of trust.

Just here counsel for complainants contends that under a just construction of the 1st part and 2nd sections of the Kentucky statute of March 10th, 1857, 1st Stanton Rev. Stats., 533–5, concerning fraudulent conveyances, preference in voluntary assignments for the benefit of creditors were abolished and absolutely prohibited, and that although no suit has been brought attacking this particular assignment within the six months limited by the 2nd section of the act, still, under the unqualified provisions of the first section, the trust-fund here must be distributed among all the claimants pro rata, disregarding the division into classes made in the trust deed.

But conceding, although by no means clear, that this deed of trust is to be governed by the laws of Kentucky, where it was made and the grantor resided, and not by the laws of Illinois, where the land conveyed in trust is situate, and where it may be presumed that the common law in regard to preference prevails, still, I am of opinion that the first and second section of the above-cited act must be construed together, and that unless a deed made thereunder with preferences
85 is attacked in the manner and within the time prescribed in the second section, the preference must be allowed to stand, and the deed, and not the statute, must govern in this respect. There are too many difficulties in the way for the admissibility of the construction contended for.

M'r's Grigsby states that the debts of her husband, which she now claims to own, and which she presents as claims on her part against the trust fund in this cause, were acquired by her with property which was her seperate estate.

There can be no doubt that she is now, and was at the time she paid or acquired those claims, and for years before, possessed of a large and valuable seperate estate, consisting of lands and personal property in Kentucky. In proof of this she files a duly certified copy of a deed dated April 5, 1851, and duly recorded under the laws of Kentucky, made by her husband, the defendant, J. Warren Grigsby, to Thomas H. Shelby, and conveying, in pursuance of an ante-nuptial marriage contract, to the Shelby, in trust for the sole and seperate use of the said Susan, all the property, real and personal, owned by her, or to which she had claim at the time of her marriage or acquired since, or that she might afterwards acquire by inheritance or otherwise.

86 M'r's Grigsby testifies in her deposition, given in this cause on the call of complainants, that at the time of her marriage she owned 1,237 or 1,239 acres, by recent survey, in Lincoln County, Kentucky, of about 100 acres of which she did not come into possession until five or six years afterwards, some 59 or 60 slaves, besides several others she received two or three years after her marriage; that there was also a good deal stock on the place, and about $10,000.00 or $12,000.00 in money; that she still owns the land; that some slaves and money were allotted to her on the death of her mother, some five or six years after her marriage, and also an interest in some real estate, town property in Danville, Kentucky, subject to a life estate in her stepfather, D'r Robert J. Breckenridge, who had died about a year before she gave her deposition, which was June 26, 1873. (Answer 1 & 2.)

But whilst counsel for complainants concedes that M'r's Grigsby possessed this large seperate estate, as shown by the evidence, he contends that she so dealt with her personalty, and especially with the rents and profits of her seperate estate, and permitted her husband so to control and use them for his own benefit, that they at any rate ceased to be her seperate estate and became his property, and that what
87 was acquired with them was his and not her property; and he cites a number of cases to sustain him in this position, viz: Powell vs. Handy (2 P. Wms., 82), Beresford vs. Armagh (13 Simons, 642), Dalbiac vs. Dalbiac (16 Vesey, 116; 2nd Roper on Husb. & Wife, Marg. p. 220), Glover vs. Allcott (11 Michigan, 471), Elegah vs. Taylor (37 Ill., 247, and 2 Story's Eq. Jurisp., § 1396). Counsel contends that these cases establish that "where the husband and wife reside on her seperate estate, and it is used and occupied as his property, the proceeds or profits cease to be her separate estate."

Let us look at facts of the case as to this matter:

The defendant Grigsby was, during the late war in this count'y, in the Southern army, and consequently absent from his home and from Kentucky for say about four years. Some of the claims presented by M'r's Grigsby were paid or acquired by her during her husband's absence in the war, whilst she alone was living on and managing her seperate estate, and some after his return home when the war had ceased.

In answer to question 8, M'r's Grigsby testifies that since their marriage her husband been engaged generally in superintending his and her property, and in dealing in real estate for some years. In answer to question 20, that she had a bank account, kept in her own name,
88 but has kept no bank account since the war or since the year 1866; that she has attended to no business since the said period; that her husband has attended to her business since then, about which she has always known something; that her husband has generally talked over business matters with her, but she has no accurate recollection in regard to all her business transactions since 1866; and that her husband has always been authorized by her in the most unlimited manner to use her means in the payment of his debts, so far as he might deem it right, necessary, or proper to do so; but that, in answer to question 1, by F. T. Fox, esquire, her counsel, she had talked with her lawyer, the Hon. Joshua F. Bell, several times in regard to her payment of these debts, when she had gone to see him in regard to other legal affairs of hers in his hands, and had talked with him on several occasions whilst she was engaged in paying off the debts without her having gone to consult him specially in relation to them; and that he assured her that she would be entitled to assert the debts against the property conveyed in trust by her husband to pay them. In answer 2, by her counsel, that she had an understanding with her husband that on paying these debts she would be entitled to be repaid, or be considered the owner of them, and entitled to their transfer,
89 and the debts were always paid by her on that understanding; that after the war a good many persons in their country had taken the benefit of the bankrupt law; that her husband was altogether averse to doing so, and she concurred with him in this; that she told him to use everything she had to pay off his debts, if it took everything she had, rather than to take the benefit of the bankrupt law, and also to endeavor to save his property in the West; that ever since their marriage she had authorized her husband to manage her business, and after the war gave him the most unlimited authority to use her means in paying his debts; but always on the understanding and with the assurance that she was to be, and would be, reimbursed out of his property, which he had conveyed in trust. In answer to question 1, on re-examination by complainant's counsel, that of course many of these sums were paid in her husband's absence and without his knowledge, but that he knew of those debts before he left, and desired her to have them paid out of the stock and produce of the place; and in answer to question 2nd of same, that she had paid these debts, or many or them, in order that her husband's creditors might not suffer by him, and in order that she might save his honor, but with the confident expectation of being reimbursed.

90 On this state of facts I am of opinion that all of the proceeds or profits of Mrs. Grigsby's seperate estate, and that such proceeds or profits generally did not cease to be her seperate estate and become her husband's property, however much those facts may conduce

to prove that she made donations of special portions of such proceeds or profits for her husband's benefit, a point to which I shall recur hereafter. By decree of the Lincoln circuit court, Ky., of January, 1868, Mrs. Grigsby was empowered to act as a feme sole.

The demands of Mrs. Grigsby, with one exception, are divisible into two classes, first those debts which were paid without assignments being made to her, and second, those which she paid, and of which she took assignments.

In her state of facts and claims—all the material facts of which are traversed by complainants' counter statement thereto—Mrs. Grigsby states, "that at the *tne* special instance and request of the defendant, J. Warren Grigsby, she has heretofore paid off and satisfied out of her own seperate estate the debts and claims against said defendant set forth as debts of the first class in the deed of trust made by said J. Warren Grigsby to R. Pindell of date 10th day of December, 1857, and which debts by the express terms of said instrument were to be first paid and satisfied out of the proceeds of the property in said
91 deed mentioned and conveyed; that some of said claims, * * * * were assigned and transferred to affiant, and she is now the owner and holder thereof, and all of the payments made by affiant were made out of her own seperate estate, at the instance and request of defendant, J. Warren Grigsby, and she avers that (she) is entitled to be substituted to the rights of the original creditors, and holders of said debts; and that there is also a debt mentioned in and secured by said deed, and which is embraced among the first class debts to be paid out of the proceeds of the trust property, to wit: a debt to Thos. H. Shelby, trustee for the affiant, Susan P. Grigsby, which debt is now due to affiant."

Nothwithstanding the traverse in the counter state of facts, it is plain from the evidence, that all these debts, except the last mentioned, have been paid out of the seperate estate of Mrs. Grigsby, and that the said named debt arose out of the sale of a part of her seperate estate, but whether the said debts are now in such a condition as to enable Mrs. Grigsby to assert all of them successfully against the trust fund in this cause, is by no means so clear, and is the question for investigation here.

I lay no stress on the fact that the payments were made at the instance and request of the defendant Grigsby. This could only create a demand against him personally and not against the trust fund,
92 except so far as there might be a surplus to be returned to him. From the time he made the deed of assignment, he ceased entirely to be the owner of the property conveyed thereby, unless there should happen to be a surplus after the satisfaction of the second debts in full, which he could claim. The number and size of the debts and the amount of the trust fund here preclude the idea that there will be any such surplus.

Here seems to be the proper place to notice another point made in argument by complainants' counsel, that some of the transactions in this case, to wit: the concealment of the making of the trust deed, the fact that R. Pindell, whilst trustee under the said deed, became the counsel for complainants as to their debts against Grigsby, that Grigsby was found in possession of the proceeds of the trust property, and that they were obtained from him only by means of this suit, savor so strongly of fraud, that these facts alone should cause the entire rejection of these demands. But without passing upon or alluding to the said facts further, I am of opinion, that, inasmuch as it is not alleged or

shown, that Mrs. Grigsby was a party to them, they cannot impair, or affect her rights in this cause.

As already stated, the debts paid by Mrs. Grigsby, or at any rate the most of them, are the preferred debts, specified in the first class
93 set out in the assignment, and so far as allowed, are to be paid in full.

The first division of the debts claimed by her are those of which she took no assignments. Those debts are as follows:

1. An acceptance of J. Warren Grigsby, discounted to and which was held by the Agricultural Deposit Bank, of Lexington, Kentucky; due Sept. 19, 1857; taken up and paid by and out of the estate of affiant (M'r's Grigsby), in full, for $5,000.00.

Proofs.—Affidavits of J. Warren Grigsby, and of J. G. James, president of the said bank.

The former says that, as agent for M'r's Susan P. Grigsby, and with money furnished by her from her seperate estate, he paid of' and *and* fully discharged this acceptance.

Mr. James states that he was the president of the bank at the time it held the acceptance in the year 1857, and that he knows that the acceptance has been fully paid and satisfied.

In respect to this debt M'r's Grigsby testifies as follows, in answer to question: that she paid that (this debt) immediately after the war; it amounted to upwards of $6,000.00 then, with the interest; and in answer to question 10, that she thinks it (the amount paid) was $6,000.00 or a little upwards; that she had previously taken up the original
94 paper with her own paper, thereby releasing Col. Hart and M'r Shelby, the endorsers; that she had promised to pay the debt, having carried on a correspondence with Mr. James, who owned the debt, in regard to it; that after her husband's return Mr. James wrote to him in regard to the debt, and it was then paid with her means; that it is her recollection that two payments were made on that debt; that first the interest was paid, perhaps, and afterwards the payment of $6,000.00 or upwards was made just after war.

Nothing further is said about a surrender, delivery, transfer, or assignment of the acceptance, and the acceptance itself is not produced.

2. An acceptance of said Grigsby, discounted to and held by the branch of the Commercial Bank of Kentucky, at Harrodsburg, Kentucky; due August 26', 1857; paid in full out of affiant's (M'r's Grigsby) estate, for $2,500.00.

Proofs.—Affidavits of J. Warren Grigsby and of Z. P. McBrayer, president of the said branch bank.

Grigsby, in his affidavit, makes an exactly similar statement in regard to this demand as he does in his affidavit in regard to the above demand No. 1.

McBrayer states that he was president of the branch bank at the time it was discontinued, and as such made the full settlement of its
95 business; and that it appears from its books that no portion of the acceptance of J. Warren Grigsby for $2,500.00, discounted and held by the bank in 1857, remains due and unpaid to them.

In respect to this debt Mrs. Grigsby testifies in answer to question 11, that (this debt) was paid, she thinks, in the winter of 1863-4; that she thinks that it was $3,000.00 that was paid, and in answer to question 12, that there were several respectable parties who notified her, through her friends, that Mr. Grigsby was their debtor, and they asked her to pay them their debts, which she promised to do, if they would give her

time; that this Commercial Bank debt was one of those debts, she thinks, and that she paid a number of such debts.

Nothing is said about a surrender, delivery, transfer, or assignment of the acceptance, and the acceptance itself is not produced.

3. A note of J. Warren Grigsby to H. H. Walter, of date January, 1857, with interest thereon, paid by affiant out of her seperate estate, and some with receipt of Walker endorsed thereon, filed with state' of facts, marked "Exhibit C," for $837.00.

Proofs.—Said Exhibit C and affidavit of N. H. Walter.

Exhibit C is the note referred to.

There is no transfer or assignment on it, but it bears this en-
96 dorsement: "Received payment in full from Mrs. Susan P. Grigsby.
N. H. Walter." Walter in his affidavit that his signature to the endorsement is true and genuine, and that said note, "as shown by his said endorsement," was paid by Mrs. Susan P. Grigsby.

4. Debts claimed under this clause of the deed of trust, viz: "An amount of about $3,500.00, due by said party (J. Warren Grigsby) in small sums to various persons in various places in Kentucky, principally current expenses of the year. Said debts paid by affiant as aforesaid (that is, out of her seperate estate) and embraced by said clause of said deed are as follows:

(A.) A. Buford	$100 00
J. S. Wilson	7 50
A. Clements	110 00
Whelles & Co	6 00
J. S. Murphy	25 00
J. H. Williamson	16 80
Pondexter	35 00
J. Peck	16 80
Paudling & Bosley (dis.)	63 00
Dr. Buck	10 00
	390 10
	390 10
Dr. Yieser	30 00
Dr. Ayers	2 00
J. H. Baker	52 50
Basset & Co.	3 85
J. H. Wiehl	8 50
Pew rent, 2nd Presbyterian Church, Danville	30 00
97 E. B. Caldwell	139 02
Bailey & Co	100 00
McKay & McNeal	38 00
J. C. Hervey	21 85
J. B. McNeal	57 53
J. Stodghill	11 80
S. P. Barbee	79 95
W. Fields	65 50
Welsh & Nicholas	491 23
Morrow & Co	49 49
R. Long	140 00
R. Alexander	150 00
N. H. Walker	138 00
Waggoner Bros	39 29
Dr. R. H. Waggoner	13 00

A. S. McGrorty	14 78
J. B. Akin	24 95
T. Dimmitt	27 37
C. P. Ball	6 20
W. H. Teveas	29 18
Geo. W. Collins	10 20
C. E. Tranaud	9 40
W. M. Stout	13 25
Weatherford & Tree	8 50
Dr. Laumee	9 43
T. C. Shouse	11 55
R. H. Dollins	150 00
White & Brother	58 89
J. H. Wentz	36 00

"The foregoing claims were paid prior to 27 March, 1858,
98 that, is about the date of the last payment; she (Mrs. Grigsby) asks and is willing to take interest from that date."

Proofs.—Affidavit of J. Warren Grigsby in which he states that he, as agent of M'r's Susan P. Grigsby, and with money furnished by her from her seperate estate, paid off and fully discharged all the debts enumerated in her claim and affidavit as follows: "A. Buford $100—to J. H. Huetz $36.00," both inclusive, amounting in the aggregate to $2,440.31.

(*b*) A debt to Solon Craig, embraced and secured by said clause of said deed of trust, paid in full by affiant with its interest *interest* from Feb'y 1st, 1857, for $1,830.00.

Proofs.—Affidavits of John W. Shelby and Solon Craig.

The former states that he was surety on the note referred to in the affidavit of Solon Craig, and as such was interested in seeing the same paid, after his principal had executed the deed of trust to Pindell, and knows that Susan P. Grigsby agreed to accept the security of the trust-deed, and pay the sum to Craig, and did pay the same in full thereafter out of the proceeds of the sale of some of her stock; which sale was made for her by affiant.

Solon Craig states that on the 10th day of December, 1857, J. Warren Grigsby was indebted to him on a note, with John W. Shelby as security thereon, dated February 1st, 1857, for $1,830, with interest from
99 date; that said note with all the interest thereon has been fully paid and discharged, but he does not know who paid the same. Nothing is said about a surrender, delivery, transfer, or assignment of the note, and it has not been produced.

(*c*) "A debt to J. P. Fisher, with interest from December 10th, 1857, which was embraced & secured by the same clause—paid and satisfied in full by her—for $700.00."

Proofs.—Affidavits of J. P. Fisher, in which he states that he is a resident of Danville, Kentucky; that on the 10th of December, 1857, J. Warren Grigsby was indebted to him by open account in the sum of $700.00, and that said debt has been paid in full by M'r's Susan P. Grigsby.

In her deposition M'r's Grigsby testifies in respect to these debts, in answer to question 18, that she paid a good many of those sums herself during the war, in sums of $200 and $300, $400 and $500, and $600 and $700; but that since looking at the list she finds that it refers to other debts than she supposed; that a great many of the debts named in the list were presented to and paid by her during the war,

and the others were paid after the war; that she recognized all the names in the list.

Counsel for complainant insists that the foregoing demands shall not be allowed, because he contends that the evidence shows that the debts have been extinguished by payment, and that M'r's Grigsby
100 was a mere volunteer, who was not compelled to pay, and who did not pay under any contract; that she had no agreement with the creditors, and no assignment or transfer from them; that she did not buy but paid the debts, and that the debts are extinct; and subsequently M'r's Grigsby cannot be substituted to the rights of the creditors against the trust fund.

I am of opinion that this is the proper view of the matter; that under the circumstances of this case there must be some evidence of an intent to preserve the debts alive, some evidence of an intent on the part of the creditors to transfer their rights to M'r's Grigsby, and something to show acts of transference on their part to her, before she can be permitted to assert these demands against the trust fund. Now the expressions used in her state of facts and in the accompanying papers, and constantly repeat' in regard to these debts, "paid off," "paid in full," "paid off and fully discharged," "paid off and satisfied," &c., &c., rebut the idea that there was any intention to keep life in these debts, and seem to show that the intent was to extinguish them, and that they are extinguished in fact. And this construction of these expressions is further strengthened by a consideration of the above quoted testimony of M'r's Grigsby, where she says that her husband had always
101 been authorized by her in the most unlimited manner to use her payment, so far as he might deem it right, necessary, or proper to do so; that she told him to use everything she had to pay off his debts, if it took everything she had, rather than to take the benefit of the bankrupt law, and also to endeavor to save his property in the West: that ever since their marriage she had authorized her husband to manage her business, and after the war gave him the most unlimited authority to use her means in paying his debts. It is true that she says that she did this always on the understanding and with the assurance that she was to be and would be reimbursed out of his property, which had conveyed in trust.

Again, as she fixes no date to her consultations with her lawyer, Hon. J. F. Bell, and it appears that where she paid a debt in 1865, and another in 1871, she took assignments from the creditors, which she had not done as to the debts theretofore paid by her, it seems to be not an unfair inference that M'r Bell's advice was given in the interval between the payment of these two classes of debts, and that in paying the earlier debts she was actuated by a desire merely to relieve her husband of his debts. Those earlier payments, under a view of all the facts, wear the aspect of donations made by M'r's Grigsby out of her separate
102 estate to her husband, and not of the purchase of debts against him or his estate in trust.

And as to the fourth group of debts *alone* set forth, there is this additional objection. It would seem that the clause in the deed of trust is too vague in itself to be operative, on the ground that it does not sufficiently identify the debts to which it was intended to apply; and, further, that there is no sufficient evidence bringing the debts claimed under the said clause within its terms. That clause is in the following language, viz:

"An amount of about $3,500 due by said party in small sums to various

persons in various places in Kentucky, principally current accounts of the year."

Here there is absolutely nothing by which to identify the debts intended to be secured. The terms "small sums" are altogether too indefinite and uncertain. The phrase "principally current accounts of the year" is somewhat less vague, but still lacks certainty, and there is no evidence to show that any of those fourth-group debts were "current accounts of the year": and some of them are for anything but small sums. One is a "note" for $1,830.00, one for $700.00, and one for $491.23. Besides, the debts now claimed under this vague clause amount to nearly $5,000.00, which cannot properly be said to be "about $3,500."

On the whole, I find that all of the above debts claimed by M'r's
103 Grigsby, and which numbered 1, 2, 3, and 4, should be rejected.

The other class of debts paid by M'r's Grigsby is that in which she took assignments. These debts are as follows, to wit:

5. Two notes of J. Warren Grigsby to Geo. H. McKinney, administrator of Thales Heuston, both due 15 Sept., 1857, paid principal and interest by affiant out of her seperate estate on 21 Aug., 1865, and said claims, one in judgment in the Lincoln circuit court, Kentucky, assigned to her by said McKinney, together with all his rights under the deed of trust, by written assignments dated Aug. 21, 1865, being Exhibit A, with her statement of facts:

One note, due Sept. 15, 1857, for	$3,255 00
One note, due Sept. 15, 1857, for	1,100 00
	$4,355 00

M'r's Grisby also claims in this con to be allowed the costs of the suit in the Lincoln circuit court on one of said notes paid by her and amounting to $82.83.

Proofs.—The assignment, Exhibit A referred to in the state of facts dated Aug. 21, 1865, signed "G. H. McKinney," and marked by me "No. 3," together with a fee-bill for $82.83, attested by W. H. Miller, clerk of the Lincoln circuit court, and accompanied by an affidavit of said McKinney proving his signature to the assignment.

104 6. A note of J. Warren Grigsby to W. P. Hart, dated June 13, 1857, paid and settled by affiant Feb'y 13, 1871, as appears by receipt and assignment of said claim, together with all his rights under the deed of trust made by Hart Gibson, administrator of said W. P. Hart, dec'd, dated February 13, 1871, and marked "Exhibit B," filed with the state of facts; principal and interest $13,326.14.

Proofs.—The assignment, Exhibit B, referred to in the state of facts, dated Feb'y 13, 1871, signed "Hart Gibson, administrator of the estate of W. P. Hart, deceased," and marked by me "No. 4," together with an affidavit of said Gibson, proving his signature to the assignment.

This note is described in the deed of trust thus: "A note of said party to W'm P. Hart for seven thousand three hundred and twenty-two dollars, due on demand about the 13th day of June, 1857."

As to these two payments M'r's Grigsby testifies in her deposition, answer 13, that she cannot recol'ect the amount of this payment (that to McKinney, No. 5, above), without looking at the receipt to refresh her memory; and that the receipt on file shows the correct amount, and answer 14, that she thinks that the receipts filed with her affidavit herein must have been taken at the same time the debts were paid; that some of those debts were paid by agents of hers, and they would of
105 course take receipts for all payments made by them, and did do it, she is very sure.

7. A debt mentioned in said deed of trust to Thomas H. Shelby, trustee, for the use and benefit of affiant, still due and unpaid, affiant now having the right to collect and controle the same, the trustee being dead, with interest from date of the deed of trust, Dec. 10, 1857, for $2,875.00.

This claim is described in the deed of trust thus: "An amount due by said party to Tho's H. Shelby, trustee, of two thousand eight hundred and seventy-five dollars."

In respect to this claim M'r's Grigsby testifies in answer to question 15 in her deposition that that (this demand) arose out of the sale of some slaves held in trust for her by uncle, Thomas H. Shelby, as all of her property was held; that her husband sold the slaves with the consent of her trustee and herself; that they were sold into Woodford County, where the slaves desired to go; and that she supposed that her husband received the proceeds of sale for her benefit.

I find that the above debts, Nos. 5, 6, and 7, should be allowed to M'r's Grigsby, with the exception of the claim of $82.83 for costs, which should be rejected; and I further find that these allowed claims
106 should be credited with the sum of $5,000.00, less $250.00 attorney's fee and commissions, leaving a balance to be credited of $4,750.00, as of the 20th day of October, 1859, as shown by M'r's Grigsby's state of facts, and her deposition, answer to question 16.

As to the other demands proved under the order of reference in this cause; these debts are claimed under the following clause of the deed of trust, viz:

"Fofirthly. To secure the payment, after said debts, &c., mentioned are paid, of all the debts of the house of Taylor, Shelby & Co. created since the 14th day of July 1857 (fourteenth day of July), for which said party may be legally liable, it being the express intent of this indenture not to create any liability except as they may now legally exist (against) him."

Of these debts, those claimed by complainants will be first considered. They are as follows:

C. W. Purcell & Co.'s debt. A bill of exchange, drawn by Taylor, Shelby, & Co., September 5, 1857, on the Shoe & Leather Bank, New York, payable Sept. 29th, 1857, to Theodore Johnston, or order, and endorsed by him to said complainants, protested for non-payment—protest fees & postage 81 cents—for $7,650 00

107 W. B. Isaacs & Co.'s, assignee of David J. Saunders, receiver of the Farmers' Bank of Virginia, debts:

1st. A bill of exchange drawn by Taylor, Shelby & Co., 5th Sept., 1857, on the Shoe and Leather Bank, New York, payable 6 Oct., 1857, to Theodore Johnston, or order, and by him endorsed to said complainants, protested for non-payment—protest fees and postage 87 cents—for $8,456 90

2nd. A bill of exchange drawn by same, 5 Sept., 1857, on same bank, New York, payable Oct. 14th, 1857, to Theodore Johnston, or order, and by him endorsed to said complainants, protested for non-payment—protest fees & postage 87 cents—for $7,000 00

Credits, as admitted by the bill of complaint, to be applied rateably to the above debts, as of—

1857, Feb'y 20th $2,156 10
1860, Mar. 13th 7,500 00

Other credits will be stated below.

Proofs.—The bills of exchange referred to are exhibited with the bill of complaint, marked (B), (C), & (D), respectively, and have been filed before me by complainants in support of their claims. Their claim is also accompanied by exhibits E and F, showing the due appointment of David J. Saunders as receiver of the Farmers' Bank of Virginia,
108 and the assignment by him to Isaacs & Co. of the last two mentioned bills of exchange.

To the complainants' demands, above set out, the claimant, Richard Apperson, j'r, who has proved a debt before me under this order of reference herein, pleads the statute of limitations of five years, and claims that his debt must be allowed in full before the complainants are to be allowed anything. Mr. Prudell, counsel for Apperson, contends that whilst it may be true that the trustee cannot be allowed to plead the statute as against a beneficiary of his trust, still another beneficiary of the trust may do so, and thus postpone the barred claim to those which are not barred, and in support of this proposition he cites Shewen vs. Vanderhorst (1 Russ. & Mylne, 347, 2 ibid., 75), and Bucking vs. Morphen (8 Hare, 125). On the other side, Mr. Harris, complainants' counsel, cites Minot vs. Thatcher (7 Metc., 348). But this is a question on which I think I am concluded by the terms of the order of reference, and I shall therefore disregard the plea.

The next question arising as to these demands is as to such collaterals as may have been held by complainants under their demands.

As shown by the testimony of E. H. Taylor, these collaterals were:

1st. A note of J. W. & J. E. Cochran for $2,156.10, being the sum first credited above on these claims.

109 2nd. The second credit of $7,500.00 above was for real estate of that value in Chicago, transferred by Taylor to C. W. Purcell.

3rd. An acceptance of Geo. H. Saunders, drawn by W. F. Roelosson, for $5,007.40, dated at New York, the 4th of August, 1857, and payable on the 15th day of October, 1857, at the Bank of the State of New York, in New York City, endorsed by Taylor, Shelby & Co., Isaac Shelby, and E. H. Taylor. Taylor testifies, answer 8, 2nd deposition, that this Sanders acceptance was subsequently returned by complainants to him, and other collaterals given by him to them, to wit, the two above named and the two which follow, the first of which last named two was given to the complainants, and the second thereof to G. B. Kinkead, their attorney.

4th. A note or acceptance of Milliken & Gamble, of New York City, for $5,000.00, he thinks. The complainants sued on this claim in 1859, in the superior court of New York City, obtained judgment thereon—a defence having been put in—in 1861, and immediately sued out execution, which was by the sheriff returned no property.

5th. A note of Samuel J. Walters for $4,580 (Taylor's depo'n, 2nd, ans. 8.)

As I understood them, at the argument, counsel made no question as to the above collaterals, not credited, except this note of Walker's; and that counsel, other than complainants' counsel, insisted they, complainants, should be charged in full with.

110 Complainants' counsel insists that this note was never received as an ordinary collateral or as a collateral which laid complainants under any duty, except in case of collection, at all. Taylor testifies that he gave this paper, as collateral, to G. B. Kinkead, complainants' attorney. Mr. Kinkead testifies, answer 5, that this note for $4,580 was never taken in discharge of any part of the balance due from Taylor, Shelby & Co.; that he refused to receive it in that way, but only held it so that if it should be paid his clients would get the benefit of it; that he

had no confidence that it would be paid; that he wrote to Mr. Walker that he had it; that he finds from his letters that this note was dated June 21, 1860, was due at twelve months with interest, and was payable to Taylor, Shelby & Co.; that not very long before Mr. R. Prudell's death he showed him, the witness, authority from his clients to surrender to him, Prudell, as their counsel, whatever papers the witness had, which the latter did, and that he has no recollection now what other papers there were besides this Walker note.

On the above facts I find that this Walker note was not received by complainants as a collateral, so as to lay them under any obligation to enforce its payment, but that they took it, merely agreeing to credit such sums as might be paid on it. This view is sustained by the case
111 of Hynes vs. Rogers (Litt. Sel. Cas., p. 229), cited by complainants' counsel.

From the deposition of H. C. Pindell it appears that Richard Prudell, whilst counsel for the complainants, received on this Walker note the sums of $500.00 and $1,000.00. Counsel for complainants concedes that these sums must go as credits on their demands.

The first is credited on the note as of Sept. 10, 1869; the other is without date, but was received a month after, some time in the summer of 1870, when M'r H. C. Pindell visited Chicago. I shall credit this sum, $1,000.00, as of Sept. 10th, 1870.

M'r Pindell, counsel for Apperson & others, contends that complainants should receive nothing further of the trust funds until the other creditors of this class shall have received from the trust fund such a per centum of their debts as complainants have received from the collaterals on their debts; in other words, that considering the sums realized by complainants on the collaterals, the other creditors must be made equal with them out of the trust funds before complainants can be allowed to receive anything further. For this point M'r Pindell cites the manuscript opinion of the court of appeals of Kentucky in the case of Guthrie, ass'ee, &c., vs. Pindell, ass'ee, delivered Oct. 21, 1870, which in its turn cites Northern Bank of Kentucky vs. Keizer (2 Du-
112 vall, 171). The first of these cases is an authority in point, in my opinion; the other is not, and does not proceed on the principle for which it is cited. I do not believe the law to be as held in Guthrie vs. Pindell, and the doctrine of that case is directly opposed to the decision of the same court in the case of Logan vs. Anderson (18 B. Mon., pp. 118–121.) It required a statutory enactment to make the doctrine contended for the law in this State in regard to decedents' estates, and the present bankrupt act, the very first principle of which is equality between creditors, affords no sanction at all to the views of the case in question, when there can be no doubt that those views would have been adopted therein had they been supposed to be the law.

I find that complainants' claim should be allowed, subject to the law.

I find that complainants' claims should be allowed subject to the credits above referred to.

The next claim of this class is that of Richard Apperson, jr.

This claim is based on a judgment of the Fayette circuit court, Kentucky, rendered on the 23rd day of August, 1858, in favor of the Bank of Louisville against Richard Apperson, sr., Isaac Shelby, Edmund H. Taylor, and J. Warren Grigsby, for $5,000, with interest thereon at the rate of six per cent. per annum from the 24th day of October,
113 1857, until paid; also the further sum of $250.00, re-exchange thereon, and $1.00 costs of protest, and $59.11 costs of suit, to be credited with $19,000 made on execution on the 13th day of May, 1861.

Proofs.—This claim is supported by a duly-certified transcript of the case in which the judgment was recovered; by an assignment thereof by the Bank of Louisville, by the cashier of its Flemingsburgh branch, to R. Apperson, j'r; and by the affidavit of Charles Tilden, proving the signature of said cashier, and that said cashier was fully authorized to make the assignment.

The bill of exchange on which the judgment is based was a bill drawn at Cincinnati on the 22nd of June, 1857, by W'm F. Roelosson, addressed to John McLean, j'r, at Cincinnati, Ohio, and directing him, four months after date, to pay to the order of Isaac Shelby the sum of $5,000.00, accepted by John McLean, j'r, payable at the Bank of Commerce, New York City, and endorsed by Isaac Shelby, Taylor, Shelby & Co., and R. Apperson, and protested for non-payment on the 24th day of October, 1857.

I have no doubt that this is one of the debts of Taylor, Shelby & Co., secured by the fourth clause of the deed of trust, although this is disputed by a counter-state' of facts on the part of complainants.

In his third deposition, E. H. Taylor testifies that the above bill
114 of exchange was discounted by the old firm of Taylor, Shelby & Co., July 3rd, 1857, and endorsed by the new firm of the same name to Apperson, August 7th, 1857. This brings it directly within this class of debts secured by the deed of trust.

I find that the principal, interest, and protest-fees should be allowed; that the $59.11 costs of suit should be rejected; and so, also, in my opinion, should the $250.00 for re-exchange, damages on such bills of exchange not being allowed in Kentucky at that time.—(See 1 Santon's Rev. Stats., pp. 272-273.)

The next claim is that of W. H. Thomas, and is based on a judgment of the Fayette circuit court, Kentucky, rendered on the 27th day of August, 1858, in favor of the firm of McClellan, Chenault & Co., composed of Noah H. McClellan, Walter Chenault, John Burnside, and J. B. Dunn, against the firm of Taylor, Shelby & Co., composed of Edmund Taylor, jr., Isaac Shelby, and J. Warren Grigsby, for $5,145, bearing interest at the rate of six per centum per annum from date until paid, and $13.05 costs of suit, to be credited with $211.50 as of the 7th day of January, 1867; $527.50, as of the 1st day of July, 1867; $980.00, as of the 10th of May, 1869; and $4,000, as of the 6th day of January, 1873. In the state of facts it is alleged that the debt on which the judgment [was
rendered*] was created since the 14th day of July, 1857, and a
115 statement is given of the transfer of the debt to the present claimant, W. H. Thomas.

In their counter state of facts the complainants deny that this debt was created since July 14, 1867, and that Thomas has a debt provable under the decree herein.

Proofs.—This claim is supported by a certified transcript of the case, in which the judgment asserted was obtained by an assignment of the judgment by W. O. Chenault, administrator of Walter Chenault, deceased, J. B. Dunn, and John Burnside—McClelland having retired from the firm, and this debt, with the other assets thereof, having passed to the other partners—to the claimant, W. H. Thomas, by the affidavit of John Burnside, to the effect that he was formerly a partner in the firm of McClellan, Chenault & Co.; that when Noah H. McClellan left the firm the assets thereof became the property of the remaining members, who continued the business under the style of Chenault & Co.; that the claim against Taylor, Shelby & Co. passed with the other assets to the

* In pencil.—PRINTER.

new firm; that Walter Chenault is dead, and W. O. Chenault was appointed his administrator; that said administrator, J. B. Dunn, and affiant have assigned the said claim to W. H. Thomas; that affiant is informed the assignment is on file in this case; that he never signed but one paper assigning the claim to said Thomas, and he knows the signature on that paper of W. O. Chenault, adm'r, was his genuine signature: by the affidavit of E. Boyle Owsley, stating that he is
116 acquainted with the signature of *E. Boyle Owsley* [Burnside†], and has seen him write, and that he believes his name appended to the assignment is in the handwriting of said Burnside, and his true and genuine signature: by a writing, dated January 10th, 1872, and signed by James A. Grinstead, releasing to W. H. Thomas his lien on the judgment in favor of McClellan, Chenault & Co. vs. Taylor, Shelby & Co.: and by the affidavit of H. C. Pindell, stating that he is well acquainted with the handwriting of James A. Grinstead, and has often seen him write; that the name of said Grinstead to the above-mentioned release is in the handwriting of said Grinstead; that J. B. Dunn delivered to witness the assignment of the judgment in the presence of W. H. Thomas, and for his benefit, and acknowledged the same to be his act and deed; that on the 10th of January, 1872, a suit was pending in the Louisville chancery court on the judgment of the Fayette circuit court in favor of McClellan, Chenault & Co. vs. Taylor, Shelby & Co., upon which the claim of Thomas herein is based; that deponent knows this fact, because he was attorney for the plaintiffs in said suit, which was brought by John Burnside and J. B. Dunn, as surviving partners of the firm of Chenault & Co., against the executor and legatees of William Shouse.

The contention as to this claim is whether it is a debt of Taylor,
117 Shelby & Co., created since the 14th day of July, 1857, the day Grigsby became a member of that firm.

As shown by the transcript of the case of McClellan, Chenault & Co. vs. Taylor, Shelby & Co., on file, this claim is based originally on a deposit of $4,975.11 made by the plaintiffs with Taylor, Shelby & Co., bankers in Lexington; that when the deposit was made said banking firm was composed of E. H. Taylor, j'r, Isaac Shelby, and William Shouse, but afterwards W'm Shouse went out of the firm, and the petition then alleges "and J. W. Grigsby came into the firm, taking the place of Shouse, the name of the firm being and remaining unchanged; that the plaintiffs claim that all the defendants are liable to them for said deposit, but that at any rate William Shouse is liable for the amount."

The petition was filed January 12th, 1858, and the summons thereon was served on Taylor and Shelby the same day, on Shouse January 15th, 1858, and on Grigsby January 22nd, 1858.

In the meantime, before Grigsby was served, an answer on his behalf and that of Taylor and Shelby, "partners, trading under the name of Taylor, Shelby & Co.," was filed on the 19th day of January, 1858, admitting that on the day of they had on deposit $ of money to the credit of McClellan, Chenault & Co., and setting up by way of defence that they, with the consent and by direction
118 of Noah H. McClellan, the managing partner of plaintiffs' firm, had appropriated the said balance to the payment of certain paper which defendants held and on which the said McClelland was bound.

On this issue there was a trial by jury August 27th, 1858, and a verdict found for the plaintiffs for $5,149.00 in damages; and thereupon on

† In pencil.—PRINTER.

the same day the court rendered a judgment for that amount and costs in favor of plaintiffs against all the defendants, including both Shouse and Grigsby.

The defendant Grigsby states in positive terms, in his first deposition herein, that his appearance in the above clause was entered without authority from him; that without his consent or knowledge or authority or subsequent ratification an answer was filed for him before he was served with process; that said answer is not his act and deed, and that the judgment is fraudulent and void, and was obtained without right as to him, &c., &c. So far as the entering of the appearance may be concerned, and also as to the filing of the answer, all this may be true, but then Grigsby was actually served with process on January 22nd, 1858, and never subsequently answered at all, although a judgment was not rendered until August 27th, 1858, and it may be that the judgment as to him could be sustained as a judgment by default.

But I do not know that the fact that this judgment was recov-
119 ered is entitled to any great weight, or that it is at all conclusive as to the trust fund here, and the rights of the creditors entitled to participate in it. It seems to me that we must look into the facts to ascertain whether this was in point of law and fact a liability of the firm of Taylor, Shelby & Co., of which Grigsby was a member, and such a liability of said firm as is embraced in the fourth class of debts secured in the trust deed. Grigsby strenuously asserts in his deposition that it was not such a liability; that this debt really arose out of a deposit made with the old firm in the spring of 1857; that he never became liable for it at all, but that the old firm alone continued liable for it.

He gives minutely the circumstances under which he became a member of the new firm, saying that he did not become an actual or interested partner in the firm, but merely loaned it the credit of name to give the concern credit with third parties in the transaction of new business. He further says that intending to become an actual and interested partner in the concern he went to Virginia for the purpose of making his moneyed arrangements, and whilst there the firm suspended payment—he thinks early in October, 1857—and after an ineffectual attempt to
120 arrange its affairs, went into liquidation; and that the developments showed it to have been insolvent when Shouse retired from the firm, and he became connected with it as above stated.

But it is rather to the facts existing at the time than to M'r Grigsby's present assertions that we are to look to enable us to solve the question now presented.

This debt was unquestionable a liability of the old firm of Taylor, Shelby & Co., of which Shouse was a member, and such being the case was of necessity created before July 14th, 1857, that firm having been dissolved July 11th, 1857. How did it become a debt of the new firm of Taylor, Shelby & Co., of which Grigsby was a member, and created since July 14th, 1857?

M'r Pindell, counsel for Thomas, contends that this debt became a liability of the new firm simply from the fact that McClellan, Chenault & Co. did not withdraw their deposit upon Shouse's retiring from the old firm and Grigsby's coming into the new one. Upon the advertisements announcing the dissolution of the old firm and the formation of the new one, and upon the fact that this deposit was left uncalled for, he implies a contract on the part of Grigsby with McClellan, Chenault & Co. subsequently to July 14th, 1857, to become liable for this debt. He seems to assume that, but for the fact that Grigsby became a mem-

ber of the new firm, they would at once have called for their money, or at least would not have left it uncalled for for any great length of
121 time. He argues that on the appearance of the notice of the formation of the new firm in the papers, it was seen by the depositors, who thereupon gave credit to the new firm, and accepted Grigsby as an additional debtor to them, and that thus their deposit is a debt of the new firm created since July 14th, 1857, and therefore within the terms of *the terms of* the trust deed.

It seems to me that this is a proper and just view of the matter, and comports with the terms of the advertisement announcing the formation of the new firm, and in which it is stated that it "will continue the business of the old house under the same name." Nor is this view inconsistent with anything in the terms of the fourth clause of the trust deed. That clause provides for all the debts of the house of Taylor, Shelby & Co. created since the 14th day of July, 1857, for which said party (Grigsby) may be legally liable, and then it goes on further to define the debts meant to be secured by the use of the following words, "it being the express intent of this indenture not to create any liability except as they may now legally exist against him" (Gregsby). Taking the whole of this language together, I think it may be well held to embrace this debt.

I therefore find that the original amount of the debt, viz, $4,975.11, with interest at the rate of six per centum per annum from January 12th, 1858, should be allowed, but that the claim for $13.05
122 costs of suit should be rejected.

The next claim is that of W'm Shouse's heirs, and is made up as follows:

Virginia Wilson	$800 00
Samuel Ayres	1,000 00
John F. Goodloe	666 66
Albert Shouse	266 66
Nannie L. Shouse	266 66
E. E. Shouse	800 00
And John Shouse	200 00

All with interest from January 17th, 1873.

The state of facts set out the existence of the firm of Taylor, Shelby & Co., of which W'm Shouse was a member, doing business as bankers in Lexington, Kentucky; the dissolution of the firm July 11th, 1857, W'm Shouse retiring, and the formation, July 14th, 1857, of the new firm of Taylor, Shelby & Co., of which J. Warren Grigsby was a member, and which new firm continued to do the same business at the same place; that when said Shouse retired from said firm the other partners retained all of its assets and assumed all of its indebtedness. It then sets out the recovery, by McClellan, Chenault & Co., of the above-mentioned judgment on a deposit with the first firm of Taylor, Shelby & Co., and which deposit continued with said new firm of Taylor, Shelby & Co., and was so their (McClellan, Chenault & Co.'s) credit in said new
123 firm; that said new firm assumed to pay the money due to said McClellan, Chenault & Co., and the same became and was the debt of said new firm, the consideration thereof being the retaining by said new firm of all the assets of the old firm. The death of William Shouse is then stated, with the fact that he left a will, by which he bequeathed certain legacies to persons therein named or described; that John Shouse, having qualified as the executor of said will, under

the directions thereof, paid to the legatees certain sums of money, among them to—

Virginia Wilson	$2,000 00
Amanda Hawkins	2,000 00
Albert Shouse	750 00
Nannie Shouse	750 00
Mary Goodloe	750 00

That on November 15th, 1871, the owners of said judgment instituted suit in the Louisville chancery court against the affiants and the said legatees and others to obtain satisfaction of said judgment, and on the 6th day of January, 1873, judgment was rendered on said claim against Virginia Wilson for $800, Amanda Hawkins $800, Samuel Ayres (the husband of Mildred Ayres) $800, John K. Goodloe (the husband of Mary Goodloe), Nannie L. Shouse, and Albert J. Shouse $800, and E. E. Shouse $800, all of whom have paid the same except
124 Amanda Hawkins; and of the amount adjudged against her one-fourth has been assigned to John Shouse, one-fourth to Samuel Ayres, and one-half to John K. Goodloe, said persons having paid the plaintiffs, in the proportions stated, in full of said judgment; that the said judgment of McClelland, Chenault & Co. was one of the debts referred to in the fourth clause of the deed of trust, and is secured, and that said Grigsby, and the funds arising from the sale of said trust property, are bound in law to indemnify the affiants for the money so paid by them as aforesaid, and that a duly certified copy of the proceedings of the Fayette circuit court, and the judgment in the Louisville chancery court are filed with the state of facts as part thereof, marked "A."

Neither of the records referred to have been exhibited or filed with me. All that is on file with this claim is a certified copy of an order of the Louisville chancery court, of June 13th, 1873, discontinuing, on motion of V. Wilson & others, their cross petition against Grigsby, in the case of J. Burnside vs. John S. Shouse, &c., No. 24,869, in the said court. The record of the McClelland, Chenault & Co. suit is, however, exhibited with Thomas' claim herein, and may be read as to this claim.

125 The complainants file a counter state of facts, in which they controvert several of the material statements made on the other side. They deny that the deposit of money with Taylor, Shelby & Co. continued with the new firm of Taylor, Shelby & Co., or was to the credit of said new firm after July 14th, 1857; or that when W'm Shouse retired from said firm the remaining partners retained all of its assets and assumed to pay all of its debts; or that as between himself and William Shouse, J. Warren Grigsby ever became a member of the firm of Taylor, Shelby & Co.; or that the debt sought to be proven by said claimants was created since the 14th day of July, 1857; or that the claimants have a debt provable under the decree herein.

No proof is produced on the part of the claimants to sustain the allegations so denied. And, besides, I find, on the testimony of Grigsby, which is, I think, corroborated by other evidence in the case, that when William Shouse retired the firm of Taylor, Shelby & Co. was in fact insolvent; and I further find, on the same testimony, that there was no understanding, contract, or privity whatever between Shouse and Grigsby in respect to the former retiring from and the latter entering the firm. Grigsby says that he and Shouse were, at the time, utter strangers to each other, and so continued up to his death.

126 I can see no ground on which to base this claim, and therefore find that it should be disallowed.

The only other matter about which there is dispute, under the order of reference to me, is as to the amount of a reasonable fee to be allowed complainants' counsel out of the fund in court.

M'r Harris, counsel for complainants, has put in a claim to be allowed $3,000.00 out of the fund in court as a reasonable fee for his services in this cause; and in support of this claim he files his affidavit setting particularly the services performed by him, and showing that those services have already resulted in bringing into court the sum of $30,000.00 and over, and will bring in the further sum of about $20,000.00 of the trust-funds for the benefit of all concerned.

M'r Pindell, counsel for Apperson and Thomas, files a counter-affidavit, in which, whilst admitting the reasonableness of the fee claimed for the services performed, he objects to his clients being charged for any part of such services as were of no benefit to them; and says that long before this suit was brought he, as attorney for McClelland, Chenault & Co. (the assignors of W. H. Thomas), and for R. Apperson, j'r,
127 was aware of the main facts of this case, and was negotiating with defendant Gregsby for a settlement of their claims, and supposed they would have been settled if this suit had not been brought; and he protests against his clients being charged anything for the obtaining such information by complainants' counsel.

To this it may be answered that M'r Pindell cannot certainly say that his negotiations ever would have resulted in the settlement of his clients' claims; he puts it as a mere matter of supposition, whilst on the other hand this suit brought by M'r Harris, counsel for complainants, has certainly resulted in such settlement, and has certainly secured for M'r Pindell's clients, and for all the creditors, a large part of their debts which might otherwise have been wholly lost. I therefore find that the counsel for complainant should be allowed the sum of $3,000.00 out of the trust-fund in court as a reasonable compensation for the services performed by him in this cause, as set forth and claimed by him in his affidavit on file.

Statement of claims allowed.

M'r's Susan P. Grigsby's claims:

1. Note due Sept. 15, 1857, for	$3,255 00	
do. " " " " "	1,100 00	
		$4,355 00
Int. fr. Sept. 15, 1857, to Oct. 20, 1859, 2 y'rs, 1 mo. & 5 da's		548 01
2. Note, due June 13, 1857, for		7,322 00
Int. fr. June 13, 1857, to Oct. 20, 1859, 2 y'rs, 4 mo's & 7 da's		1,033 63
128 3. Amount due Dec. 10, 1857, to T. H. Shelby, trustee		$2,875 00
Int. fr. Dec. 10, 1857, to Oct. 20, 1859, 1 y'r, 10 mo's & 10 days		321 04
		$16,454 68
1859, Oct. 20. Cr. by cash		4,750 00
		$11,704 68
Int. fr. Oct. 20, 1859, to July 14, 1874, 14 y'rs, 8 mo's & 23 da's		10,344 98
Balance due July 14th, 1874		$22,049 66

Complainants' claim, which their counsel tells me I may consider together, they undertaking to make distribution as between themselves:

1. Debt due Sept. 29th, 1857, for	$7,650 00
Interest fr. Sept 29th, 1857, to Feb'y 20, 1859 (1 y'r, 4 mo's, 22 da's)	640 05
2. Debt due Oct. 6, 1857, for	8,456 90
Int. fr. Oct. 6, 1857, to Feb'y 20, 1859, 1 y'r, 4 mo's, & 14 da's	696 29
Carried over	$17,443 24

Brought over		$17,443 24
3. Debt due Oct. 14th, 1857, for		7,000 00
Int. fr. Oct. 14, 1857, to Feb'y 20, 1859, 1 y'r, 4 mo's, & 6 da's		567 00
		$25,010 24
1859, Feb'y 20th. Cr. by cash		2,156 10
		$22,854 14
Int. fr. Feb. 20, 1859, to Mar. 13th, 1860, 1 y'r & 21 da's		1,451 23
		$24,305 37
1860, Mar. 13. Cr. by cash		7,500 00
		$16,805 37
Int. fr. Mar. 13, 1860, to July 14, 1874, 14 y'rs, 4 mo's, & 1 da'		14,455 41
		$31,260 78
1869, Sept. 10. Cr. by cash	$500 00	
1870, Sept. 10. " " "	1,000 00	
		1,500 00
Balance due July 14th, 1874		$29,760 78
129 R. Apperson, j'r's, claim:		
Debt due Oct. 24, 1857, for		$5,000 00
Int. fr. Oct. 24, 1857, to July 14, 1874, 16 y'rs, 8 mo's, & 20 da's		5,016 66
Protest fee		1 00
		$10,017 66
1861, May 3. Cr. by cash		190 00
Balance due June 14, 1874		$9,827 66
W. H. Thomas' claim:		
Debt due Jan'y 12, 1858, for		$4,975 11
Int. fr. Jan. 12, 1858, to Jan. 6, 1873, 14 y'rs, 11 mo's, & 24 da's		4,472 61
		$9,447 72
1867, Jan. 17. Cr. by cash	$211 50	
July 1. " " "	527 50	
1869, May 10. " " "	980 00	
1873, Jan. 6. Cr. by cash	4,000 00	
		5,719 00
		$3,728 72
Int. fr. Jan. 6, 1873, to July 14, 1874, 1 y'r, 6 mo's, & 8 da's		339 31
Balance due July 14, 1874		$4,068 03

I also find an account in the papers of Mess'rs Moore & Caulfield, attorneys, of Chicago, Illinois, for professional services rendered in that city to the trust-fund in the years 1865, 1866, 1867, 1868, 1869, & 1870, and supported by the affidavit of S. M. Moore, one of said firm, which should be allowed, for $500.00.

Distribution.

139 I find that the amount for distribution in the hands of W. A. Meriwither, receiver in this cause, is, as per his report herewith returned, $31,374.42, which I distribute as follows, to wit:

To M'r's S. P. Grigsby, in full		$22,049 66
" complainants, pro rata		3,707 72
" R. Apperson, jr., pro rata		1,224 39
" W. H. Thomas, pro rata		506 82
" W. O. Harris, counsel fee		3,000 00
" Moore & Caulfield, fees		500 00
" complainants, for—		
clerk's costs	$20 55	
marshal's costs	45 78	
depositions	19 50	
		85 83
" master com'r, fee for report		300 00
		$31,374 42

All of which is respectfully reported.

JAMES A. BEATTIE,
Master Com'r.

JULY 14TH, 1874.

131, 132 The statement of facts of Susan P. Grigsby and ten other papers referred to in the master commisssioner's report is as follows:

Statement of facts of Susan P. Grigsby.

In the circuit court of the United States for the district of Kentucky.

IN THE MATTER OF C. W. PURCELL & CO., plaintiffs,
vs.
J. WARREN GRIGSBY & CO., DEFENDANTS.

Affidavit & claim of M'r's Susan P. Grigsby.

The affiant, Susan P. Grigsby, of Boyle County, & State of Kentucky, states that at the special instance and request of defendant J. Warren Grigsby, she has heretofore paid off and satisfied out of her own seperate estate, the debts and claims against said defendant set forth as debts of the first class in the deed of trust of said J. Warren Grigsby to R. Pindell of date 10th day of December, 1857, and which debts, by the express terms of said instrument, were to be first paid and satisfied out of the proceeds of the property in said deed mentioned and conveyed. Some of said claims, as hereafter set forth, were assigned and transferred to affiant, and she is now the owner and holder thereof, and all of the payments made by affiant were made out of her own seperate estate at the instance and request of defendant J. Warren Grigsby, and she avers that is entitled to be substituted to
133 the rights of the original creditors & holders of said debts.

There is also a debt mentioned in, and secured by, said deed and which is embraced among the first class debts to be paid out of the proceeds of the trust property, to wit, a debt to Tho's H. Shelley, trustee for the affiant, Susan P. Grigsby, and which debt is now due to the affiant.

The debts and claims so paid off by affiant and now held by her are as follows:

An acceptance of said J. Warren Grigsby, discounted to and was held by, the Agricultural Deposit Bank, of Lexington, Kentucky, for the sum of five thousand dollars, and which was taken up and paid by and out of the estate of affiant's in full. Said acceptance was due 19th day of September, 1857, and affiant is entitled to interest thereon from said date.

An acceptance of said J. Warren Grigsby, discounted to and held by the Branch of the Commercial Bank of Kentucky, Harrodsburg, K'y, for the sum of twenty-five hundred dollars, due and payable August 26, 1857, and which was paid in full out of affiant's estate, and affiants claims repayment of said sum and interest on same from 26th August, 1857.

134 The notes of said J. Warren Grigsby to George H. McKinney, administrator of Thales Huston, both due on 15th of September, 1857; one for three thousand two hundred & fifty-five dollars, and the other for eleven hundred dollars, and which two notes, principal and interest, were paid by affiant out of her seperate estate on the 21st day of August, 1865, and said claims (one of which was in judgement in the Lincoln circuit court of Kentucky) were assigned by said George H. McKinney, together with all his rights under said deed of trust, to the affiant, by his written assignment of date 21st day of August, 1865, which is filed herewith as part hereof, marked "Exhibit A." She also

paid $82.23 costs of suit, &c., above alluded to, as shown by certificate of clerk hereto attached, which costs were paid about 21st August, 1865.

A note of said J. Warren Grigsby to W. P. Hart, of date June 13, 1857, and which affiant paid and settled Feb'y 13th, 1871, amounting to thirteen thousand three hundred and twenty-six $\frac{14}{100}$ dollars, as will fully appear from the receipt and assignment of said claim, together with all his rights under the deed of trust made by Hart Gibson,
135 administrator of the estate of said W. P. Hart, who had departed this life. Said sum in satisfaction of said claim was paid by and out of the separate *of* estate of affiant. Said assignment of said administrator of date February 13th, 1871, marked "Exhibit B," is filed herewith as part hereof.

A note of said J. Warren Grigsby to N. H. Walter, of date Jan'y 1st, 1857, for eight hundred and thirty-seven dollars, with interest from date, which was paid by affiant out of her seperate estate, and same with receipt of said Walter endorsed thereon is filed herewith, marked "Exhibit C." This sum with its interest affiant is entitled to.

In addition to said claims, affiant has paid off and satisfied out of her seperate estate large amounts of debts due and owing by said J. Warren Grigsby at the time and date of the execution and delivery of said deed of trust, and embraced in and secured by said deed of trust, and among the first class of debts to be paid and which are and were intended to be embraced by the general clause in said deed as follows, to wit: "An amount of about $3,500 due by said party in small sums to vari-
136 ous persons in various places in Kentucky, principally current accounts of the year." Said debts paid by affiant as aforesaid, and embraced by said clause of said deed, are as follows: A. Buford, $100; J. S. Wilson, $7.50, A. Clements, $110; Wheller & Co., $6.00; J. S. Murphy, $25.00; J. H. Williamson, $16.80; Poindexter, $35.00; J. Peck, $16.80; Drs. Pawling & Voosley, $63.00; Dr. Bush, $10.00; Dr. Zeiser, $30.00; Dr. Ayres, $2.00; J. H. Baker, $52.50; Basset & Co., $3.85; J. H. Wiehl, $8.50; pew rent, 2nd Presbyterian Church, Danville, $30.00; E. B. Caldwell, $139.02; Bailey & Co., $100; McKay & McNeil, $38.00; J. C. Hewey, $21.85; J. B. McNeil, $57.53; J. Stodghill, $11.80; S. P. Barbee, $79.95; W. Fields, $65.50; Welsh & Nichols, $491.25; Morrow & Co., $49.49; R. Lang, $140.00; R. Alexander, $150.00; N. H. Walter, $138; Waggner Bros., $38.29; Dr. R. J. Waggner, $13.00; A. S. McGrorty, $14.78; J. B. Akin, $24.95; L. Dunnitt, $27.37; C. P. Ball, $6.20; W. H. Lucas, $29.18; George W. Collins, $10.20; C. E. Farraud, $9.40; W. M. Stout, $13.25; Weatherford & Lee, $8.50; D. Laumie, $9.43; T. C. Shause, $11.55; R. H. Dollins, $150.00; White & Brother, $58.89; J. H. Wurtz, $36.00.

The foregoing claims were paid prior to 27 day of March, 1858, but that is about the date of the last payment, & she asks & is willing to take interest from said date. She also paid to Solon Craig a debt
137 embraced and secured by said clause of said deed of trust for $1,830.00, upon which interest ran from Feb'y 1st, 1857, and was paid in full by affiant, with its interest; also a debt to J. P. Fisher for $700, with interest from 10th day of Dec'r, 1857, which was embraced and secured by the same clause, and was paid & satisfied in full by affiant. All the above debts and the amounts as stated were paid by affiant, as before alleged, out of her seperate estate, and which sums with interest she claims from proceeds of said trust property.

In addition to the foregoing, the debt mentioned in said deed of trust to T. H. Shelley, trustee, of two thousand eight hundred and seventy-five dollars, was due to Shelley as trustee, and for the use and benefit

of affiant, and still is due and unpaid, and the right of affiant now to collect & control the same (her said trustee having departed this life) will fully appear from the statements hereafter made. Upon said debt of $2,875.00 affiant is entitled to interest from the date of said deed of trust, to wit, the 10th day of December, 1857, the said debt being in fact due previous to said date.

Affiant states that her claims above set forth are just and due,
138 and have never to her knowledge or belief been paid, except the sum of $5,000.00 recovered & received about the 20th day of Oct., 1859, less the sum of $250.00 for attorney's fee & commissions for collecting same. Nor is there any legal or equitable affect or discount against the same or any usury embraced therein. Affiant claims & avers that she is entitled, & hereby asserts her right to have her said debts paid out of the proceeds of said trust property conveyed by said Grigsby to R. Pindell by said deed, as preferred debts, & before payment of any of the other debts, in whole or in part, embraced by & mentioned in said deed of trust.

Affiant states that by deed the legal title to her estate, real & personal, was held by Tho's H. Shelley, of Fayette County, Kentucky, for the seperate use and benefit of affiant until his death in the year 18 , and that since his death, by proper proceedings had in the Lincoln circuit court of Kentucky (affiant and her husband then being resident of Lincoln County, Kentucky), in case J. Warren Grigsby & Susan P. Grigsby, on petition, a judgment was rendered by said court at its
, term, 18 , authorizing and empowering the affiant to act as a
139 feme sole in accordance with provisions of an act of the general assembly of the Commonwealth of Kentucky, entitled an "Act to amend chapter forty-seven, section sixteen, title 'Husband and wife,'" revised statutes, approved February 14, 1866, & by which judgment of said court affiant was authorized and empowered to exercise one and all of the powers in said act enumerated, and she therefore now claims the right to assert her foregoing claims in her own name and right, & to collect and receive the same.

A certified copy of said judgment is filed herewith.

Affiant prays for all proper relief, legal and equitable, in the premises.

SUSAN P. GRIGSBY.

Subscribed and sworn to before me by Susan P. Grigsby, this 8th day of February, 1873.

WILLIAM GOODLOE,
U. S. Commissioner, Ky. Dist.

COMMONWEALTH OF KENTUCKY:

Lincoln circuit court, January special term, 1868.

Susan P. and J. Warren Grigsby. On petition. Exparte.

The following is a copy of the decree rendered herein, at the special January term, 1868, to wit:

Susan P. and J. Warren Grigsby. Upon petition.

140 The affidavits of J. R. Marrs, M. J. Durham, and T. J. Dillehay were produced and ordered to be recorded. And in this cause the court rendered the following judgment, which was ordered to be filed, to wit:

This cause having been heard upon the petition and exhibits, and the notice of the filing of the petition and the objects thereof heretofore

ordered to be made in the Kentucky Advocate having been filed with affidavit of the editor of said paper, that said notice had been published in said paper as required by law, and there being no objection filed against the prayer of the petition, it is therefore now adjudged that the petitioner, Susan P. Grigsby, be, and the same is hereby, decreed and empowered to use, enjoy, sell, and convey, for her own benefit, any property she may own or acquire, free from the claim or debts of her husband, to make contracts, to sue and be sued as feme sole, to trade in her own name, and to dispose of her property by will or deed.

The matters herein having been adjudicated and settled, this cause is stricken from the court's docket.

COMMONWEALTH OF KENTUCKY, *set:*

Lincoln circuit court.

141 I, W. H. Miller, clerk of the court aforesaid, do hereby certify that the foregoing is a true copy of the decree of the Lincoln circuit court rendered at its January special term, 1868, on the petition of Susan P. Grigsby and J. Warren Grigsby, her husband, the same having been truly transcribed by me from the records in my office.

Given under my hand and seal of office affixed this 6th day of February, 1873.

[SEAL.]

W. H. MILLER, *Clerk*,
By A. C. SNOW, *D. C.*

Circuit court of the United States, district of Kentucky.

In matter of claim of Susan P. Grigsby filed in suit of C. W. Purcell &c., vs. J. Warren Grigsby, &c.

The affiant, J. Warren Grigsby, states that, as the agent of Mrs. Susan P. Grigsby, and with money furnished by her from her seperate estate, he paid off and fully discharged the acceptance for five thousand dollars referred to in the accompanying affidavit of J. G. James.

J. WARREN GRIGSBY.

Subscribed and sworn to before me by J. Warren Grigsby this 12th day of February, A. D. 1873.

JAMES A. BEATTIE,
U. S. Com'r.

142 Circuit court of the United States.

In the matter of Susan P. Grigsby, filed in suit of C. W. Purcell vs. J. Warren Grigsby, &c.

The affiant, J. G. James, states that he is a resident of Fayette County, Kentucky, and was president of the Agricultural Deposit Bank of Lexington, Kentucky, and was so at the time said bank, in the year 1857, held an acceptance of J. Warren Grigsby for the sum of five thousand dollars, and affiant knows that the said acceptance of five thousand dollars has been fully paid and satisfied.

J. G. JAMES.

STATE OF KENTUCKY,
Fayette County, set.:

J. G. James personally appeared before me and made oath that the foregoing statements are true.

Given under my hand and official seal this 8th day of July, 1873.

PHIL. F. BROWN,
Notary Public, Fayette County.

Circuit court of United States, district of Kentucky.

In the matter of claim of Susan P. Grigsby, filed in suit of C. W. Purcell, &c., vs. J. Warren Grigsby.

143 The affiant, J. Warren Grigsby, states that as agent of M'r's Susan P. Grigsby, and with money furnished by her from her seperate estate, he paid off and discharged the acceptance referred to in the accompanying affidavit of Z. P. McBrayer.

J. WARREN GRIGSBY.

Subscribed and sworn to by J. Warren Grigsby before me, this 12th day of February, 1873.

JAMES A. BEATTIE,
U. S. Com'r.

Circuit court of United States, district of Kentucky.

In the matter of claim of Susan P. Grigsby, filed in suit of C. W. Purcell, &c., vs. J. Warren Grigsby, &c.

The affiant, Z. P. McBrayer, states that he was the president of the branch of the Commercial Bank of Kentucky located at Harrodsburg at the time said branch was discontinued, and as such made the full settlement of its business; that it appears from the books of the bank that no portion of the acceptance of J. Warren Grigbsy for sev-
144 enty-five hundred dollars, discounted and held by the bank in 1857, now remains due and unpaid to them.

Z. P. McBRAYER.

Subscribed and sworn to before me by Z. P. McBrayer, this 4th day of Feb'y, 1873.

W. W. EDWARDS, *N. P. M. C.*

G. H. McKINNEY, ADM'R, &C.,
vs.
J. W. GRIGSBY, &c.

Pl'ff's clerk's costs, 4.80; sheriff, 1.00; tax & att'y fee, 3.00; sheriff's com., 73.63; clerk's cost for replevin bond, .40—82.83.

Att.,

W. H. MILLER, *C. L. C. C.*

Mrs. Susan P. Grigsby having paid off two notes executed to me as adm'r of Thales Huston, dec'd, by J. Warren Grigsby, one for eleven hundred dollars, due 15th Sept., 1857, with interest from that date, and one for three thousand two hundred and fifty-five dollars, due 15 Sept., 1857, with interest from that date, upon the latter of which suit was brought in the Lincoln circuit court, now, I therefore transfer & assign to her said demands, with all the rights I had in the same, & with the right secured to me for their payment under the deed of trust, an
145 assignment of said J. Warren Grigsby of certain property in the city of Chicago to R. Pindell, esq., made for the purpose of securing payment of the claims against said Grigsby.

Given under my hand this 21st day of August, 1865.

G. H. McKINNEY.

J. A. LYTLE.
P. M. TALBOT.

Circuit court of the United States, district of Kentucky.

In the matter of claim of Susan P. Grigsby, filed in suit of C. W. Purcell, &', vs. J. Warren Grigsby, &c.

The affiant, G. H. McKinney, states that he is a resident of the county of Lincoln, Kentucky, and that he duly signed the foregoing receipt and assignment.

G. H. McKINNEY.

STATE OF KENTUCKY,
Lincoln County, sct.:

Sworn to and subscribed before me by G. H. McKinney, at my office in Stamford, K'y, this 5 day of February, 1873.

JNO. J. M. ROBERT,
Notary Public L. C., K'y.

Circuit court of United States, district of Kentucky.

146 In matter of claim of Susan P. Grigsby, filed in suit of C. W. Purcell, &c., vs. J. Warren Grigsby, &c.

The affiant, Hart Gibson, states that he is a resident of the city of Lexington, Kentucky, and administrator of the estate of W'm P. Hart, dec'd, and as such duly signed the receipt and assignment hereunto annexed.

HART GIBSON.

FAYETTE COUNTY, *Ky.:*

Hart Gibson personally appeared before me and made oath that the foregoing statements are true.

Witness my hand and official seal this 6th day of February, 1873.

PHIL. F. BROWN,
Notary Pub. Fayette County.

$13,326$\frac{04}{100}$] WOODFORD CO., K'Y, *Feb'y*, 1871.

Received of M'r's Susan P. Grigsby thirteen thousand three hundred and twenty-six $\frac{04}{100}$ dollars, principal and interest of note of J. Warren Grigsby to W. P. Hart, dated June 13, 1857, and in consideration of said payment, I hereby assign and transfer to M'r's Susan P. Grigsby all the rights of said Hart under the deed of trust of J. Warren Grigsby to R. Pendell, duly recorded in the office of the clerk of the
147 county of Cook, State of Illinois, given to secure the payment of said note and other debts therein specified.

HART GIBSON,
Administrator of the Estate of W. P. Hart, deceased.

JAN'Y 1ST, 1857.

Twelve months after date I promise to pay N. H. Walter, or order, eight hundred & thirty-seven (837.00) dollars, with interest from date.

J. WARREN GRIGSBY.

(Endorsed on back as follows:)

Received payment in full from M'r's Susan P. Grigsby.

N. H. WALTER.

The affiant, N. H. Walter, a resident of Boyle County, Kentucky, states that his endorsement on the note of J. Warren Grigsby, for

$837.00, of date Jan'y 1st, 1857, of payment thereof, is his true and genuine signature, and that said note, as shown by his said endorsement, was paid by M'r's Susan P. Grigsby.

N. H. WALTER.

Sworn and subscribed to before me, by N. H. Walter, this 6th day of February, 1873.

H. G. SANDIFER, *N. P.*

148 United States circuit court, district of Kentucky.

In the matter of claim of Susan P. Grigsby, filed in suit of C. W. Purcell, &c., vs. J. Warren Grigsby, &c.

The affiant, J. Warren Grigsby, states that as the agent of M'r's Susan P. Grigsby, and with money furnished by her from her seperate estate, he paid off and fully discharged all the debts enumerated in her claim and affidavit, as follows: A. Buford, $100; to J. H. Wertz, $36.00, both inclusive, amounting in the aggregate to $2,460.31.

J. WARREN GRIGSBY.

Subscribed and sworn to before me, by J. Warren Grigsby, this 12th day of February, A. D. 1873.

JAMES A. BEATTIE,
U. S. Com'r.

Circuit court of United States, district of Kentucky.

In matter of claim of Susan P. Grigsby, filed in suit of C. W. Purcell, &c., vs. J. Warren Grigsby, &c.

149 The affiant, John W. Shelby, states that he was the surety on the note referred to in the affidavit of Solon Craig, and as such was interested in seeing the same paid after his principal had executed the deed of trust to Pindell, and knows that Mr's Susan P. Grigsby agreed to accept the security of the trust deed and pay the same to Craig, and did pay the same in full thereafter out of the proceeds of the sale of her stock, which sale was made for her by this affiant.

JNO. W. SHELBY.

Subscribed and sworn to before me this 6th day of Feb'y, 1873.
[SEAL.] H. G. SANDIFER, *N. P.*

Circuit court of United States, district of Kentucky.

In matter of claim of Susan P. Grigsby, filed in suit of C. W. Purcell, &c., vs. J. Warren Grigsby, &c.

The affiant, Solon Craig, states that on the 10th day of Dec'r, 1857, J. Warren Grigsby was indebted to this affiant on a note, with Jno. W. Shelby as security thereon, dated Feb'y 1st, 1857, for eighteen hundred and thirty dollars ($1,830.00) with interest from date; that said
150 note with all interest thereon has been fully paid and discharged, but he does not know who paid the same.

SOLON CRAIG.

Sworn to before me by Solon Craig this Feb. 5, 1873.
[SEAL.] JNO. B. OWSLEY,
Notary Public, S. C.

Circuit court of United States, district of Kentucky.

In matter of claim of Susan P. Grigsby, filed in suit of C. W. Purcell, &c., as J. Warren Grigsby, &c.

The affiant, J. P. Fisher, states that he is a resident of Danville, Kentucky; that on the 10th of December, 1857, J. Warren Grigsby was indebted to affiant on open account in the sum of seven hundred dollars, and that said debt has been paid in full by Mrs. Susan P. Grigsby.

J. P. FISHER.

Subscribed and sworn to before me this 8th day of Feb'y, 1873.

H. G. SANDIFER, *N. P.*

STATE OF KENTUCKY,

County of Fayette, set.:

This indenture, made and entered into this fifth day of April, A. D. 1851, between John Warren Grigsby, of the county of Fayette,
151 and State of Kentucky, of the first part, and Thomas H. Shelby, also of said county and State, trustee for Susan P. Grigsby, of the same county and State, of the second part, witnesseth:

That whereas the said J. Warren Grigsby did by certain articles of agreement of three parties, indented and made the fifth day of November last past, between the said J. Warren Grigsby, of the first part, Susan P. Grigsby, of the second part, and Thomas H. Shelby, of the third part, bind himself to convey to the said Thomas H. Shelby, in trust for the sole and seperate use and benefit of the said Susan P. Grigsby, certain property and estate therein expressed, and hereinafter more particularly described, upon condition that a marriage should be had and solemnized between the said J. Warren Grigsby and the said Susan P. Shelby, which was then in contemplation and agreed upon; and whereas the said marriage was had and solemnized as contemplated, between the said parties upon the day aforesaid, to wit, the fifth day of November, one thousand eight hundred and fifty:

Now, in consideration of the premises and in discharge of and compliance with his covenant aforesaid, the said J. Warren Grigsby doth by these presents bargain, sell, and convey to the said Thomas H.
152 Shelby in trust for the sale and seperate use and benefit of the said Susan P. Grigsby, all and singular the lands and tenements of which the said Susan was seized and possessed, or to which she may have had any right, claim or title, at the time of said marriage, together with all the lands and tenements that may hereafter come to his hands through the said Susan by inheritance or otherwise. Also all the slaves, money, cash, bonds, and other personal estate of every kind whatsoever, in the possession of said Susan at the time of said marriage, or that has been acquired since, or that may hereafter be acquired by inheritance, or otherwise, through the said Susan, to have and to hold the same for the sole use and benefit of the said Susan as aforesaid, with power and authority to sell or dispose of any part or all of said estate, real or personal, at the request of said Susan, and with the right and power reserved to the said Susan P. Grigsby to dispose of by last will and testament to whomsoever she may choose the whole of the estate hereinbefore conveyed; and the said J. Warren Grigsby hereby further covenants, agrees, and promises, that this conveyance shall not in any
153 event operate as a bar to the claims of the said Susan P. Grigsby to dower in the estate of the said J. Warren Grigsby and the

said Thomas H. Shelby, who hereby accepts the trust hereby and herein created, have hereunto set their hands and affixed their seals, the day and date first within written.

J. WARREN GRIGSBY. [L. S.]
THO'S H. SHELBY. [L. S.]

COMMONWEALTH OF KENTUCKY,
Fayette County, sct.:

I, James A. Grinstead, clerk of the county court for the county aforesaid, do certify that this deed of trust from John Warren Grigsby to Thomas H. Shelby was this day produced to me, in my office, and acknowledged by the said John W. Grigsby and Thomas H. Shelby to be their act and deed and ordered to be recorded.

Whereupon the said deed of trust, together with the foregoing certificate, hath been duly admitted to record in my office.

Given under my hand this 5th day of April, 1851.

Att:

JAMES A. GRINSTEAD, *Clk.*

STATE OF KENTUCKY,
Fayette County, sct.:

I, Allie G. Hunt, clerk of the Fayette county court, certify the foregoing deed of trust, from J. Warren Grigsby to Thomas H. Shelby,
154 with the certificate of *of* acknowledgment thereon, is truly copied from the records of my office.

Witness my hand and official seal this 26th day of February, 1873.

ALLIE G. HUNT, *Clk.*

The counter state' of facts on claim of Susan P. Grigsby, cited by complainants and referred to in commissioner's report, is as follows:

Counter statement of facts on claim of Susan P. Grigsby.

Before James A. Beattie, esqr., master.

C. W. PURCELL &c.
vs.
J. WARREN GRIGSBY &c. } Counter facts.

The complainants, C. W. Purcell and others, for counter state' of facts to the affidavit and claim of Mrs. Susan P. Grigsby, state:

They say that it is not true that the payments therein referred to were made out of the seperate estate of the said claimant.

They say that it is not true that defendant, Warren Grigsby, is, or was at the time of the execution of the deed of trust to Pindell, indebted to said claimant as any trustee for her in the sum of $2,875.00, or in any other sum.

They say that it is not true that said claimant paid out of her
155 seperate estate the acceptance for $5,000.00 held by the Agricultural Deposit Bank of Lexington, or the acceptance for $2,500.00 held by the branch of the Commercial Bank of Kentucky at Harrodsburg.

They say that it is not true that said claimant paid out of her seperate estate the debts to Geo. H. McKinney, administrator, or to W. P. Hart, or Hart Gibson, or that she is entitled to the same in her own right or to her seperate use.

They say that it is not true that said claimant paid and took up with her seperate funds the note of A. H. Walter, mentioned in her said claim.

They say that it is not true that said claimant has paid any of the debts described in deed to Pindell, an amount of about $3,500.00 due by said party in small sums to various persons in various places in Kentucky, principally current accounts of the year.

And complainants deny that said Susan P. Grigsby is entitled to a preference out of the fund in this case, or is entitled to prove any debt herein.

W. O. HARRIS,
For Compl'ts

156 The copies of the record in the case of Charles W. Purcell et al. against R. B. Mullikin, and the execution issued in said case, & the deposition of E. H. Taylor, jr., are as follows:

The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come, greeting:

Know ye that we, having inspected the files of the superior court of the city of New York, do find there remaining on file a certain judgment roll in an action wherein Charles W. Purcell et al. plaintiffs and R. B. Millikin defendant, in the words and figures following, to wit:

Superior court of the city of New York.

CHARLES W. PURCELL, PHILIP G. SUTTON, & the President, Directors & Company of the Farmers' Bank of Virginia, plaintiffs,
against
R. B. MILLIKIN, DEFENDANT.

Summons for a money demand on contract.

To the defendant above named:

You are hereby summoned and required to answer the complainant in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complainant on the subscriber at their office, No. 45 Wall street, in the city of New York, with-
157 in twenty days after the service hereof, exclusive of the day of such service, and if you fail to answer the complainant within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of five thousand dollars, with interest from the first day of February, one thousand eight hundred and fifty-eight, besides the costs of this action.

Dated New York, July 27, 1857.

EATON, DAVIS & TAILER,
Plaintiffs' Attorneys.

Superior court of the city of New York.

CHARLES W. PURCELL, PHILIP T. SUTTON, & the President, Directors & Company of the Farmers' Bank of Virginia,
ag't
R. B. MILLIKIN.

The plaintiff aforesaid, by Eaton, Davis & Tailer, their attorneys, for cause of action against the defendants & on information and belief allege: That at the times hereinafter referred to and at the present

time the said Charles W. Purcell and Philip T. Sutton were copartners in business, and composed the firm of Charles W. Purcell & Co., hereinafter referred to, and that at said times the said The President, Directors & Co. of the Farmers' Bank of Virginia was and is a corporation duly constituted, existing and doing business as a bank in the State of Virginia and under and by virtue of the laws thereof.

And the plaintiffs further allege that on or about the 26th day of May, 1858, they had a claim against the defendant of greater amount than the sum herein claimed (and now owned by the plaintiff), and which they could and would have disposed of or collected but that the defendant requested the plaintiffs to forbear so to do, and to take of the defendant or his firm of Millikin & Gamble another claim on certain persons herein referred to, and which the defendant represented to the plaintiffs would be paid within twelve months, and to induce the plaintiff to take said claim, stated that if the same was not paid by said other persons or the defendant did not collect the same within twelve months, the defendant would pay the plaintiffs five thousand dollars and interest, and offered to deliver the plaintiff a paper writing giving the particulars of said claim.

That the plaintiffs, desiring to accommodate the defendant, received said claim & paper writing on the terms proposed by the defendant, and agreed that on the payment of said $5,000 by the defendant they would return said paper writing so delivered to them.

That said paper writing was in the words and figures following, as will appear by the original, to wit:

HUGH EWING, Esq.:

Out of the proceeds of the sales of the property which you, as trustee of G. F. Taylor, jr., Isaac Shelby, and J. Warren Grigsby and William F. Paelosson, are directed to make on the 10th of May, 1858, for the purpose of paying the bills due by George N. Sanders for a purchase of said property from the *vestice* que trusts, and now held by Taylor, Shelby & Co., you are desired and requested to pay to Millikin & Gamble the sum of three thousand and sixty dollars (say $3,060), with six per cent. per annum interest from the 27th of March, 1858, until paid, with exchange between Lexington, Kentucky, and the city of New York, and also to pay to the said Millikin & Gamble the further sum of twenty-two hundred and fifty-one dollars and sixty-eight (say $2,251.68), with like interest from the 25th of Feb'y, 1858, until paid, with like exchange. The said sums are now evidenced by two bills of the above amounts, held by the said Millikin & Gamble, upon which they are accommodation acceptors for Taylor, Shelby & Co. and J. Swigist, and which were given in substitution or renewal of a bill of $5,187.40, accepted by said Sanders for and in part to secure the purchase-money of the property above stated, and which bill was given up to Taylor, Shelby & Co. by Millikin & Gamble upon the reception of the bills above described, namely, those for $3,060.11 and for $2,251.68: to pay which latter bills, with the interest and exchange stated, is the object of this order.

You will therefore pay due respect to the request herein made, and consider this as an assignment to Millikin & Gamble of so much of the before-mentioned fund to be received by sales as aforesaid as may be necessary to pay the sums with interest and exchange first above stated.

Lexington, Kentucky, April 8th, 1858.

TAYLOR, SHELBY & CO.

HUGH EWING, Esqr.:

D'R SIR: Ben J. Adams, of Louisville, K'y, being the legal owner of the above-stated bills, you will please make payment to him.

R. B. MILLIKIN.

Millikin & Gamble, in sign, for Millikin & Gamble, in sign.

I relinquish to W. H. Macfarland, president of the Farmers' Bank of Virginia, without recourse on me.

BEN J. ADAMS.

That the signatures to said paper purporting to be those of Millikin & Gamble and R. B. Millikin are in the handwriting of the defendant, and that the firm of Millikin & Gamble, of which the defendant was a member, was at the time in liquidation; that the plaintiffs have no certain knowledge whether said claim so transferred to them has or not been paid to said Millikin, but they aver it has not, nor any part thereof, been paid to or collected by them or either of them, and that the sums due them as aforesaid by the defendant are still unpaid.

That to said paper writing so transferred to them by the de-
162 fendant was attached a contract or assignment, of which the following is a copy, to wit:

For value received, I hereby assign and transfer to the president, directors, & company of the Farmers' Bank of Virginia, and to Ch's W. Purcell & Co., the paper writing above annexed; and since in consideration of this assignment they relinquish and give up a claim by them against me asserted for a sum beyond what they can receive hereby, I promise to pay them the sum of five thousand dollars, with interest from the day of February last, provided they do not collect that amount from this assignment within twelve months from the date hereof and shall return to me the above annexed paper or writing.

Witness my hand this 20th of May, 1858.

R. B. MILLIKIN.

Signed & sealed on the day above stated in presence of—
H. R. MILLIKEN.
23rd Feb'y, 1858.—B. J. A.

That the same was signed and delivered by the defendant about the date thereof, and that the same was witnessed H. R. Millikin, and that the same bears the signature of B. J. Adams, mentioned in said paper writing so transferred to the plaintiffs, and that said Adams
163 also signed his name to said paper writing on the face thereof, & the interest purporting to have been conveyed by him to W'm H. Macfarland now belongs to the plaintiffs upon the conditions of said contract of the 26th May, 1868, by reason of an assignment made by said Adams. And the plaintiffs aver they have used due exertion and diligence to collect the sum of $5,000 out of said assigned claim, but have been unable to collect any portion of said sum, and have so notified the defendant, and demanded the sum of $5,000 and interest of him, & offered to deliver him said paper writing so transferred to the plaintiff, all before the commencement of this suit and after twelve months from said 26th day of May, 1858; but the defendant has refused to pay the plaintiff $5,000.00 or any portion thereof, & still so refuses, and the plaintiff hereby offer' to deliver the defendant said paper writing, being the annexed paper referred to in said contract of the 26th May, 1858, on the payment of $5,000 and interest.

Wherefore the plaintiffs demand judgment against the defend-
164 ant for the sum of $50,000 and interest thereon from the first day of February, 1858, and the costs of this action.

EATON, DAVIS, & TAILOR,
Pl'ffs' Att'ys.

COUNTY OF NEW YORK, *ss:*

D. B. Eaton, being duly sworn, says that he is one of the attorneys and agent of the plaintiffs, who reside and are out of the State of New York; that the action is founded on a contract for the payment of money, and which contract is now in deponent's possession; that deponent has read the foregoing complaint & knows the contents thereof, & that the same is true of his own knowledge, save as to matters therein stated on information and belief, and that as to those matters he believes the same to be true.

D. D. EATON.

Sworn to before me this 27th day of July, 1859.

EDWIN F. COREY,
Comm'r of Deeds.

CITY & COUNTY OF NEW YORK, *ss:*

John A. Delany, of the city of New York, being duly sworn, de-
165 poses and says that, on the 27th day of July, 1859, at No. 28 Beaver street, in the city of New York, he served a copy of the annexed summons, together with a copy of the foregoing complaint therein mentioned, on R. B. Millikin, the defendant in this action, by delivering the same to him, such defendant, personally, and by leaving the same with him; he further says that he knew the person served as aforesaid to be the person mentioned and described in the said summons as the defendant therein.

JOHN A. DELANY.

Sworn to before me this 30th day of July, 1859.

EDWIN F. COREY,
Comm'r of Deed's.

N. Y. superior court.

CHARLES W. PURCELL, PHILIP T. SUTTON, & the President, Directors, and Company of the Farmers' Bank of Virginia,
ag'st
ROBERT B. MILLIKIN.

The defendant answers to the plaintiffs' complaint:

First. He has no knowledge or information sufficient to form a belief whether or not the plaintiffs, Purcell & Sutton, were at the times
166 stated in the complaint or now are partners or composed the firm of Charles W. Purcell & Co., or whether or not at the said times the president, directors, and company of the Farmers' Bank of Virginia were or now are a co'poration duly organized or existing under or by virtue of the laws of the State of Virginia.

Second. He denies that at the time alleged in the complaint, the plaintiffs had any just, legal, or equitable claim whatsoever against this defendant, or that any such claim could have been disposed or collected by the plaintiffs, or that he made any request, representations, or state-

ment alleged in the said complaint, or that the plaintiffs received any paper writing to accommodate the defendant, or upon any terms or agreement other that expressed in the writing signed by him whereby he transferred his interest or part thereof in certain claims in the hands, or under the control, of Hugh Ewing, esqr., as trustee of Taylor, Shelley & Co., hereinafter mentioned.

Third. He says that before the time of the transaction mentioned in the complaint, and on which the plaintiffs' claim in this action is based, Theodore Johnson and Taylor, Shelley & Co. were indebted to his firm of Millikin & Gamble in an amount of several thousand dollars, as security for which the said Taylor, Shelley & Co., by writing,
167 signed with their firm name, transferred to said Millikin and Gamble a certain interest in the property in the hands of said Ewing, as trustee of said Taylor, Shelley & Co., or in the proceeds thereof. That afterwards, the said firm of Millikin and Gamble being in liquidation, and Benjamin J. Adams being owner of certain bills intended to be secured by said transfer, this defendant and his said firm, by a written order addressed to said Ewing, directed him to make payment thereof to said Ewing, and transferred the interest of said Millikin and Gamble in said security to said Adams.

Fourth. That afterwards the said Charles W. Purcell & Co. and the president, directors & company of the Farmers' Bank of Virginia, respectively, claiming to be endorsers of said Johnson and of Taylor, Shelley & Co., this defendant, with the consent and approbation of said advances, by writing signed by him, transferred to them the aforesaid security signed by Taylor, Shelley & Co., and given by them to said Milliken & Gamble, and before the said transfer was made by this defendant to the said Charles W. Purcell & Co. and said bank, they agreed with him that upon his making the same they would exonerate and discharge him from a claim for a much larger amount than the sum demanded
168 in this action which they pretended to have against this defendant under an alleged guarantee of debts claimed to be due from the said Johnson and the said Taylor, Shelley & Co. to them. That this defendant had not signed, given, or executed to the said Charles W. Purcell & Co. or to said bank any guarantee or other security for any debt or liability of said Johnson, or of said Taylor, Shelley, & Co. to them or either of them, but their pretended claim against this defendant was based on a letter written by him in the name of said Millikin & Gamble to one Gilbert, and not for their or either of their use or benefit, and which, without this defendant's knowledge or consent, had been delivered to said Charles W. Purcell & Co., or to some officer of said bank. That this defendant was advised and beleived and still beleives that neither the said Charles W. Purcell & Co. nor said bank had any legal or equitable right or claim against him in the premises, but beleiving he could otherwise secure and obtain payment of what was due to him from said Johnson and said Taylor, Shelley & Co., and to avoid litigation with the said Charles W. Purcell & Co. and said bank,
169 he agreed that if they would release him from said pretended claim he would make the aforesaid transfer to them, and that if they could not obtain payment of five thousand dollars and interest out of the securities so transferred to them within twelve months from such transfer, that he would, on the same being transferred to him, pay them the last-mentioned sum and interest. That in pursuance of such agreement he made and delivered to them the aforesaid transfer, in which was contained some stipulation or agreement by this defendant to take back the said securities at the expiration of twelve months from the

date thereof, provided they could not or did not collect the said five thousand dollars and interest from the same, and in such case that this defendant would pay that sum and *and* interest to them. That at or before the execution or delivery of such transfer the said Adams, by some writing, relinquished, transferred or made over his interest in the said securities and the proceeds thereof to the president of said bank.

That no other transfers, orders, or writings than above mentioned
170 relating to the premises were made, signed, or delivered to the knowledge and beleif of this defendant, and he has no copy of either of them, and has not any knowledge or information sufficient to form a beleif whether or not the same are correctly set forth in said complaint.

Sixth. He admits that the signatures of Millikin and Gamble and R. B. Milliken to said transfer are in his handwriting, and that said firm of Millikin and Gamble was then in liquidation, as alleged in said complaint. He denies that the claim so transferred by him, or any part thereof, has been received by or paid to him, but he has not any knowledge information sufficient to form a belief whether or not the same, or any part thereof, has been collected or received by the plaintiffs, or by said Charles W. Purcell & Co., or said bank, or whether or not the writing set forth in the complaint under date of 20th May, 1858, bears the signature of said Adams, or whether or not he signed his name to the others paper-writing set forth under date of April 8th, 1858, or the order directing payment to be made to him as aforesaid, but this defendant admits that the said Adams signed his name to the relinquishment of his interest to the president of said bank.

171 Seventh. This defendant has not any knowledge or information sufficient to form a beleif whether or not the interest purporting to have been conveyed to William H. Macfarland now belongs to the plaintiffs or to said Charles W. Purcell & Co., or to said bank, either absolutely or upon any condition whatever, or whether or not they or either of them have used due or any diligence or exertion to collect the said sum of five thousand dollars out of said aforesaid claims or have been unable to collect any portion thereof, but he avers, on information and beleif, that since the said transfer to said Charles W. Purcell & Co. and said bank, the said Ewing, as trustee, has realized and received more than the amount of said five thousand dollars and interest. He admits that a demand has been made upon him on behalf of the said Charles W. Purcell & Co. and said bank since the 26th day of May, 1859, for payment of said five thousand dollars and interest, but that no reassignment or retransfer by them or either of them, or by said Macfarland & president of said bank, has been tendered or offered to him, and, so far as he knows and beleives, no such assignment or transfer to him has been made
172 or executed, and he therefore denies that they or either of them have made the offer in that behalf alleged in said complaint.

Eight. He denies that he is liable to pay to them the amount claimed in the complaint or any part thereof.

BUCKHAM, CADY & SMALLS,
Defendant's Attorneys.

CITY & COUNTY OF NEW YORK, *ss:*

Robert B. Millikin, being duly sworn, says that he is the defendant in the above-entitled action, and that the aforegoing answer is true to his own knowledge, except as to these matters which are therein stated

on information and belief, and as to those matters he believes it to be true.

R. B. MILLIKIN.

Sworn to before me this 23rd day of September, 1859.

J. F. ROBERTS,
Comm'r of Deeds.

At a trial term of the superior court of the State of New York, held at the city hall in the city of New York on the 12th day of April, 1861. Present, Judge White.

CHARLES W. PURCELL ET AL.
against
R. B. MILLIKEN. } Inquest before the court & jury.

173 The defendant in this action being called and failing to answer or appearing, on motion of plaintiffs' attorney, ordered that the default of the defendant be, and the same is hereby, entered.

Whereupon, the pleadings having been examined by the court and the jury and 1 witness sworn, it is found that the defendant is indebted unto the plaintiff in the sum of $6,118.57 damages.

Ordered, judgment for the plaintiffs against the defendant for that amount besides costs.

Extract from the minutes.

ROBERT D. LIVINGSTON,
Clerk.

Superior court of the city of New York.

CHARLES W. PURCELL, PHILIP T. SUTTON, and The President, Directors, & Company of the Farmers' Bank of Virginia,
against
R. B. MILLIKIN.

This action being at issue and a trial by jury having been waived therein by the defendants failing to appear, and such trial being had on the twelfth day of April, in the year one thousand eight hundred and sixty-one, before the court, the Hon. J. W. White, justice presid-
174 ing, whose decision has been entered with the clerk, whereby judgment is ordered for the plaintiffs for six thousand one hundred and eighteen dollars and fifty-seven cents, besides costs, and the court having made an allowance of one per cent. on said amount:

Now, on motion of Eaton, Davis & Tailer, plaintiffs' attorneys, it is hereby adjudged that Charles W. Purcell, Philip T. Sutton, and The President, Directors, & Company of the Farmers Bank of Virginia, the plaintiffs, recover of R. B. Millikin, the defendant, the sum of six thousand one hundred and eighteen dollars and fifty-seven cents, with one hundred and ninety-five dollars and seventy cents costs, disbursements, and allowance, amounting in the whole to the sum of six thousand three hundred and fourteen dollars and twenty-seven cents, and that said plaintiffs have execution therefor.

R. D. LIVINGSTON,
Clerk.

Filed April 15th, 1861, @ 9 50 a. m.

All which we have caused by these presents to be exemplified and the seal of the superior court of the city of New York to be hereunto affixed.

Witness John J. Freedman, esquire, presiding justice of our
175 said court, at the city hall of the city of New York, this first day of December, A. D. 1873.

THOMAS BOESE,
Clerk.

Superior court of the city of New York.

CHARLES W. PURCELL ET AL.
against
R. B. MILLIKIN.

I, John J. Freedman, presiding justice of the superior court of the city of New York, do hereby certify that Thomas Boese, whose name is subscribed to the preceding exemplification, is the clerk of the said superior court, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the said exemplification is the seal of the said superior court of the city of New York, and that the attestations thereof is in due form of law.

Dated New York, December 1st, 1873.

JNO. J. FREEDMAN,
Presiding Justice of the Superior Court of the City of New York.

STATE OF NEW YORK,
City and County of New York, ss:

I, Thomas Boese, clerk of the superior court of the city of New York, do hereby certify that John J. Freedman, whose name is subscribed
176 to the preceding certificate, is the presiding justice of the superior court of the city of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of the said court this 1st day of December, 1873.

[SEAL.] THOMAS BOESE, *Clerk.*

UNITED STATES OF AMERICA,
District of Kentucky & County of Franklin, set:

The deposition E. H. Taylor, j'r, taken on the 20th day of March, 1874, at the counting-room of said E. H. Taylor, j'r, in the city of Frankford, State of Kentucky, upon interrogatories, supplemental interrogatories, and cross-interrogatories hereto attached, to be read as evidence in an action between C. W. Purcell and others, pl'ff, vs. J. W. Grigsby & others, def'ts, in the circuit court of the United States for the district of Kentucky, and now pending before James A. Beattie, master, commissioner of said court.

The said E. H. TAYLOR, j'r, in answer to said interrogatories, supplemental interrogatories, and cross-interrogatories in the order in which they are stated, deposes and says:

1. Were you a partner of the firm of Taylor, Shelley & Co.?

177 **2. When was the draft of William F. Raelosson on Jno. McClean, j'r, of Cincinnati, endorsed by the firm of Taylor, Shelley & Co.?**

3. Why was the admission of J. W. Grigsby into the firm of Taylor, Shelley & Co. announced in the newspapers in Lexington before the terms of the partnership were finally arranged?

4. Where did the members of the firm of McClellan, Chenault & Co. reside?

5. If you say your conclusions as to dates are to any extent drawn from entries in your books, say whether or those entries were made in the regular course of your business, appear in the proper places in your books for *the proper places in your books for* the dates mentioned; and whether or not the books are at those places scratched or interlined, or show any evidence of having been tampered with.

Cross-interrogatories on behalf of complainants, C. W. Purcell & others:

1. If, in answer to interrogatory 2, you fix the date of the endorsement therein referred to, state whether you do so from your own recollection of the event or from any book or paper; and, if from any book or
178 paper, describe the same, and state by whom the entry was made.

2. When did the draft of Roelsson on McLean come into the possession of Taylor, Shelby & Co., and was its endorsement part of the business of Taylor, Shelby & Shause?

3. Examine the paper filed in this cause Dec. 26, 1873, now enclosed to you with these interrogatories, and being a record from the superior court of the city of New York in an action wherein Charles W. Purcell &c., were plaintiffs and R. B. Millikin def't. State whether the contract or contracts sued on in said case and copied at large into said record are the same referred to by you in a deposition previously given in this case as the Milliken collateral. State whether Taylor, Shelby & Co. ever transferred to complainants, or any of them, any papers of R. B. Millikin or Millikin & Gamble other than that set out in said record. Mark said record and make it part of your deposition.

W. O. HARRIS,
For Compl'ts.

Additional interrogatories to be propounded to E. H. Taylor, j'r, by R. Apperson, j'r:

1. If you say you speak as to the date of the transfer of the bill of exchange on which claimant's claim is founded exclusively from books, please say whose books they were in which the entry appears?
179 By whom the entry was made? Where the person making it now resides? How he came to make the entry? Whether or not it was in the regular course of his duty to make it? When the entry was made? Whether or not it was at the time the transaction occurred, and whether not it was his duty and habit to make his entries at the time the transaction occurred to which they related?

H. C. PINDLE, *Att'y.*

I have no objection to the propounding of the above interrogatory to Mr. Taylor and reading of his answer to same as his deposition.

W. O. HARRIS,
For Compl'ts.

Answer. Yes.

Ans. 2. August 7th, 1857.

Ans. 3. Grigsby's partnership was announced because of withdrawal of W'm Shause. We felt it in our interest to announce new partner on withdrawal of old that further publications and changes might not have to be made.

Ans. 4. McClellan resided in Lexington, Chenault in Madison County, and Dunn, I think, in Gerrard.

Ans. 5. My assertion as to date is derived from books of Taylor, Shelby & Co. The entries were made in regular course of business;

appear in the proper places. The books and entries are in all respects regular, without scratches or tampering in any way.

And in answer to cross-interrogatories:

Answer. I fix date from books named entirely; from general cash-book and deposit cash-book. The entries were made by the firm book-keeper, J. Benkendorff.

180 2. The bill was discounted by the old firm and was endorsed to Apperson by the new one as part of their business. The old firm discounted the bill 3rd July, 1857.

3. I believe the contracts referred to be the same referred to in my deposition formerly given. The transfers to complainants were complicated, and I think, were changed or exchanged on several occasions, and I cannot say positively whether or not there were other transfers than set out in said record. I mark said record with my initials and make same part of this deposition.

Answers to additional interrogatories:

Answer. The books were those of Taylor, Shelby & Co. The entries were made by J. Benkendorff, who was bookkeeper of said firm, and now resident, I believe, Brooklyn, N. York, or was several years since. The entries were regularly made in the regular course of his business. The entries were made on date named, at the time of the transaction, when it was both his habit and duty to make them.

And further deponent sayeth not.

EDM'D H. TAYLOR, J'R.

UNITED STATES OF AMERICA,
District of Kentucky, sct:

I, D. W. Lindsey, United States commissioner in and for the
181 district aforesaid, do certify that the foregoing depositions of E. H. Taylor, j'r, was taken before me, and was read to and subscribed by him in my presence, at the time and place and in the actions mentioned in the caption, the said Taylor having been first sworn by me that the evidence he should give in the action should be the truth, the whole truth, and nothing but the truth, and his statements reduced to writing by him in my presence, neither party in person or by attorney being present at the examination.

Given under my hand this 20th day of March, 1874.

D. W. LINDSEY,
U. S. Commissioner, K'y dist.

Statement of facts on claim of R. Apperson, j'r.

The sworn state of facts of R. Apperson, j'r, and three other papers referred to in the commissioner's report and filed March 22d, 1873, are as follows:

Circuit court of the United States for the district of Kentucky.

Before master in chancery, J. N. Beatty.

PURCELL AND OTHERS
against
GRIGSBY AND OTHERS.

State of facts and claims by R. Apperson, j'r.

R. Apperson, j'r, says, that on the 23rd day of August, 1858,
182 the bank of Louisville, a corporation chartered by the general assembly of the commonwealth of Kentucky, recovered in the

Fayette circuit court for the county of Fayette and State of Kentucky, a judgment against Richard Apperson, s'r, Isaac Shelby, Edmund H. Taylor, and J. Warren Grigsby, for the sum of five thousand dollars with interest thereon at the rate of six per centum per annum from the 24th day of October, 1857, until paid; also the further sum of two hundred and fifty dollars re-exchange thereon and one dollar costs of protest and fifty nine $\frac{11}{100}$ dollars costs of suit; said judgment is entitled to credit by the sum of one hundred & ninety dollars made by execution on the 13th of May, 1861, all of which more fully appears from a certified transcript of the record of the suit in which said judgment was rendered, which is filed herewith as part hereof.

This said judgment was on the 20 day of Sept., 1868, assigned to this claimant by the said Bank of Louisville, as appears from said assignment herewith filed as part hereof.

And the said R. Apperson, jr., says the amount of said judgment is by the said parties against whom it was rendered, and especially
183 by the said J. Warren Grigsby, justly due to him, and that no part thereof except as above set forth has been paid, nor is there any offset or discount against the same.

The said judgment was rendered upon a bill of exchange drawn by Wm. T. Roelosson on John McClean, jr., in favor of Isaac Shelley, and said bill of exchange came into the hands of Taylor, Shelley & Co., and endorsed and negotiable by them after the 14th day of July, 1857.

Wherefore, the said R. Apperson, jr., claims that the above judgment be allowed by the commissioner as a just claim upon the trust assets to be administered in this cause and that he be reported for his proper distributable share thereof.

H. C. PINDELL,
For Complainant.

DISTRICT OF KENTUCKY, *set.:*

R. Apperson, jr., says he believes the statements in the foregoing claim are true.

R. APPERSON, JR.

Subscribed and sworn to before me by R. Apperson, jr., this 11 March, 1873.

JNO. W. HAZELRIGG,
U. S. Commissioner.

Affidavit to the claim of R. Apperson, jr.

Circuit court of the United States for the district of Kentucky:

184 Before Master Commissioner Jas. L. Beattie.

PURCELL AND OTHERS
against
GRIGSBY AND OTHERS.

Charles Tilden says he is President of the Bank of Louisville, and knows the handwriting of N. L. Andrews, cashier of the Flemingsberg branch of said bank. That the transfer of the judgment of said bank against Taylor, Shelley & Co. for $5,000, with interest from 24th of October, 1857, re-exchange $250, costs $61.04, & protest fee $1, to R. Apper-

son, jr., filed herein, is signed by said Andrews, cash'r, and that he was fully authorized to make the transfer.

CHAS. TILDEN.

Subscribed and sworn to before me by Charles Tilden, this 22d day of March, 1873.

JAMES A. BEATTIE,
U. S. Com'r.

The president, directors & co. of the Bank of Louisville have a judgment against Taylor, Shelley & Co., and R. Apperson, in the Fayette circuit court, for $5,000, and interest from 24 Oct., 1857; re-exchange $250, costs $61.04, protest $1.00.

185 This judgment is for the use and benefit of R. Apperson, jr., and is hereby transferred to him without recourse on said bank in any event.

Sept. 20, 1868.

N. S. ANDREWS,
Cashier of Branch Bank of Louisville at Flemingsberg, Ky.

Fayette circuit court.

STATE OF KENTUCKY:

Pleas held before the honorable Judge W. C. Goodloe, judge of the court for the circuit aforesaid, at the court-house in the city of Lexington, on the 23rd day of August, 1858.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Louisville, plaintiff,
vs.
JOHN MCLEAN, jr., WILLIAM F. ROELOSSON, Isaac Shelby, Edward H. Taylor, jr., J. Warren Grigsby, & Richard Apperson, defendants.

Be it remembered that heretofore, to wit, on the 30th day of June, 1858, the plaintiff, by their attorneys, filed their petition herein, in the words and figures as follows, viz:

Petition.

The plaintiff, the president, directors, and company of the Bank
186 of Louisville, state that the defendant William F. Roelosson, on the 22d day of June, 1857, drew his bill of exchange of that date at Cincinnati, in Ohio, addressed to the defendant John McLean, jr., and thereby directed said McLean to pay $5,000 to the order of the defendant, Isaac Shelby, four months after said date; which bill of exchange said McLean then and there accepted, payable at the Bank of Commerce, in the city and State of New York, and said Roelosson thereupon delivered it to said Isaac Shelby, who endorsed and delivered it to Taylor, Shelby & Co., a firm composed of said Shelby and the defendants, Edmund H. Taylor, jr., & J. Warren Grigsby, and said Taylor, Shelby & Co. afterwards endorsed and delivered said bill to the defendant, Richard Apperson, who afterwards, for a full and valuable consideration, endorsed and delivered it to the plaintiff. On the 24th day of October, 1858, the time limited by said bill and the usual days of grace allowed thereon by the law and custom of New York having expired, the plaintiff caused due presentment for payment to

be made of said bill to the paying teller of said Bank of Commerce at said bank in the usual business hours & payment thereof to be demanded of him, which he refused, whereupon the said bill was duly protested for non-payment; of all which, including the due pro-
187 test and dishonor of the bill, the defendant' were, each and all, thereupon forthwith duly notified. No part of the amount due by said bill has been paid. The said bill and protest are filed herewith. The plaintiff avers that at the maturity of said bill the re-exchange thereupon between New York City and Cincinnati was 5 per cent., and the same was the re-exchange between New York and all points of Kentucky.

Wherefore the plaintiff prays judgment for the amount of said bill, with re-exchange, interest, $1 costs of protests, which were p'd by plaintiff, costs of suit, and for all proper relief.

HARRISON AND HUNT, *P. Q.*

The Commonwealth of Kentucky, to the sheriff of Fayette County, greeting:

You are commanded to summon John McLean, jr., William F. Roelosson, Isaac Shelby, Edmund H. Taylor, jr., J. Warren Grigsby, and Richard Apperson, to answer on the first day of the next August term of the Fayette circuit court a petition filed against them in said court by the president, directors, & company of the Bank of Louisville, and warn them that upon their failure to answer, the petition will be
188 taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons on the first day of the next August term of said court.

Witness John B. Norton, clerk of said court, this 30th day of June, 1858.

Att: JOHN B. NORTON, *C. F. C. C.*

Sheriff's return.

Executed July 22d, 1858, by delivering to Isaac Shelby a true copy of the within summons.

A. F. DUDLEY, *S. F. C.*,
By WM. R. DUDLEY, *D. S.*

Summons.

The Commonwealth of Kentucky, to the sheriff Montgomery County, greeting:

You are commanded to summon John McLean, jr., William F. Roelosson, Isaac Shelby, Edmund H. Taylor, jr., J. Warren Grisby, & Richard Apperson to answer on the first day of the next August term of the Fayette circuit court a petition filed against them in said court by the president, directors, and company of the Bank of Louisville, and warn them that upon their failure to answer the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next August term of said court.

Witness John B. Norton, clerk of said court, this 30th day of June, 1858.

Att.: JOHN B. NORTON, *C. F. C. C.*

189 *Sheriff's return.*

Came to hand July 3d, 1858.

JNO. W. CLAY, *S. M. C.*

Executed upon Richardson Apperson, sr., by giving him a true copy of the within summons July 3d, 1858.

JNO. W. CLAY, *S. M. C.*

189 *Summons.*

The commonwealth of Kentucky to the sheriff of Franklin County, greeting:

You are commanded to summon John McLean, jr., William F. Roelosson, Isaac Shelby, Edmund H. Taylor, jr., J. Warren Grigsby & Richard Apperson to answer, on the first day of the next August term of the Fayette circuit court, a petition filed against them in said court, a petition by the president, directors, & company of the Bank of Louisville, and warn them that, upon their failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons on the first day of the next August term of said court.

Witness John B. Norton, clerk of said court, this 30th day of June, 1858.

Att. JOHN B. NORTON, *C. F. C. C.*

Sheriff's return.

Executed on E. H. Taylor July 2d, 1858; a copy of the within delivered him.

H. J. MORRIS, *S. F. C.*

190–194 *Summons.*

The commonwealth of Kentucky to the sheriff of Lincoln County, greeting:

You are commanded to summon John McLean, jr., William F. Roelosson, Isaac Shelby, Edmund H. Taylor, jr., J. Warren Grigsby, and Richard Apperson to answer, on the first day of the next August term of the Fayette circuit court, a petition filed against them in said court by the president, directors, & company of the Bank of Louisville, and warn them that, upon their failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt, and you will due return of this summons on the first day of the next August term of said court.

Witness John B. Norton, clerk of said court, this 30th day of June, 1858.

Att. JOHN B. NORTON, *C. F. C. C.*

Sheriff's return.

Executed on J. Warren Grigsby July 8th, 1858, by delivering him a true copy of the within.

J. P. BAILEY, *D. S. E.*
For E. B. CALDWELL, *S. L. C.*

And afterwards, to wit, at a court continued and held for the
195 circuit aforesaid on the 12th day of August, 1858, the plaintiff filed an exhibit herein, which is noted.

Afterwards, to wit, at a court continued and held for the circuit aforesaid on the 23rd day of August, 1858, the plaintiffs and the defendant, Richard Apperson appeared by their attorneys, and the defendant R. Apperson filed his answer herein, to which he heretofore made oath, which is noted.

The plaintiffs thereupon demurred to the answer of the defendant R. Apperson herein, and the questions of law arising therein having been heard and considered by the court, it is ordered that said demurrer be sustained. To which the defendant R. Apperson excepts.

The demurrer of the plaintiffs to the answer of the defendant R. Apperson, herein, having been heard and sustained, and said Apperson saying nothing further in bar or preclusion of the plaintiffs' claim herein against him, and the defendants Isaac Shelby, Edmund H. Taylor, jr., and J. Warren Grigsby having been duly summoned, and failing to answer, it is adjudged by the court that the plaintiffs recover of the said Richard Apperson, Isaac Shelbey, Edmund H. Taylor, jr., and J. Warren Grigsby, the sum of five thousand dollars, with interest
196 thereon at the rate of six per centum per annum from the 24th day of October, 1857, until paid; also, the further sum of two hundred and fifty dollars re-exchange thereon, and one dollar costs of protest; and, also, their costs herein expended.

Answer of R. Apperson.

Fayette circuit court.

BANK OF LOUISVILLE, PL'FF,
vs.
McLEAN & OTHERS, DEFT.

The defendant R. Apperson says that he received no notice of protest of the bill sued on.

FAYETTE COUNTY, *set:*

R. Apperson says he believes the foregoing answer is true.

R. APPERSON.

Sworn to by R. Apperson before me this Aug. 19th, 1858.

No. 2946.

$5,000.] CINCINNATI, *22d June*, 1857.

Four months after date, pay to the order of Isaac Shelby five thousand dollars, value received, and charge the same to account of

Oct. 25. W'M F. ROELOSSON.

To JOHN McLEAN, J'r, Esqr.,
Cincinnati, Ohio.

Accepted, payable at Bank of Commerce, New York City.

JOHN McLEAN, Jr.

(Endorsed:) Isaac Shelby, Taylor, Shelby & Co., and R. Apperson.

197 Pay J. Purnett, esq., cas., or order.

H. POWERS, *Cas.*

UNITED STATES OF AMERICA,
State of New York, ss:

On the twenty-fourth day of October, in the year of our Lord one thousand eight hundred and fifty-seven, at the request of the Bank of America, in the city of New York, I, J. P. Giraud Foster, a notary public, duly admitted and sworn, dwelling in the city of New York, did present the original bill of exchange, or draft thereto annexed, to the paying-teller of the Bank of Commerce, in New York, at said bank in said city, and demanded of him payment thereof, which he refused.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer, acceptor, and endorsers of said bill of exchange or draft as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred, for want of payment of the said bill of exchange or draft.

Thus done and protested in the city of New York aforesaid, in the presence of John Doe and Richard Roe, witnesses.

In testimonium veritatis,

J. P. GIRAUD FOSTER,
198 *Notary Public, 69 Wall Street.*

Fi. fa.

The Commonwealth of Kentucky to the sheriff of Montgomery County, greeting:

You are hereby commanded that, of the estate of Richard Apperson, Isaac Shelby, Edmund H. Taylor, jr, & J. Warren Grigsby, late of our bailiwick, you cause to be made the sum of five thousand dollars, with interest thereon at the rate of six per cent. per annum, from the 24th day of October, 1857, until paid; also, the further sum of two hundred and fifty dollars, re-exchange thereon, & one dollar costs of protest, which the president, directors, and company of the Bank of Louisville, late in our Fayette circuit court recovered against them; also, $59\frac{11}{100}$, which to the said Bank of Louisville in our said court was adjudged for its costs by it, about its suit in this behalf expended, whereof the said Richard Apperson, &c., are convict, as appears to us of record, and that you have the same before the judge of our said court, at the court-house in Lexington on the 4th Monday in October next, to satisfy and pay the said debts, int. and costs aforesaid, and have there and then this writ.

199 Witness John B. Norton, clerk of our said court, at the court-house aforesaid, this 2d day of September, 1858, and in the 67th year of the Commonwealth.

Att.: JOHN B. NORTON,
C. F. C. C.

Came to hand September 8th, 1858.

JNO. W. CLAY,
S. M. C.

No property found in this county that this execution can be made, or any part thereof.

This October 20th, 1858.

JNO. W. CLAY,
S. M. C.

The Commonwealth of Kentucky to the sheriff of Greenup County, greeting:

You are hereby commanded that, of the estate of Richard Apperson, Isaac Shelby, Edmund H. Taylor, j'r, and J. Warren Grigsby, late of your bailiwick, you cause to be made the sum of five thousand dollars, with interest thereon at the rate of six per cent. per annum from the 24th day of October, 1857, until paid; also the further sum of two hundred and fifty dollars re exchange thereon, and one dollar costs of protest, which the president, directors, and company of the Bank of Louisville, late in our Fayette circuit court recovered against them; also, $59.61,
200 which to the said Bank of Louisville, in our said court, was adjudged for its costs by it, about its suit in this behalf expended, whereof the said Richard Apperson, &c., are convict, as appears to us of record, and that you have the same before the judge of our said court, at the court-house in Lexington, on the 4th Monday in December next, to satisfy and pay the said debts, int., and costs aforesaid, and have there then this writ.

Witness John B. Norton, clerk of our said court, at the court-house aforesaid, this 1 day in November, 1858, and in the 67 year of the commonwealth.

Att.: JOHN B. NORTON,
C. F. C. C.

Came to hand Nov. 10, 1858, at half past 2 o. c. p. m. No property found whereon to levy and make this execution or any part thereof.

G. W. DARLINTON, *S. G. C.*

The Commonwealth of Kentucky to the sheriff of Carter County, greeting:

You are hereby commanded that of the estate of Richard Apperson, Isaac Shelby, Edmund H. Taylor, jun'r, & J. Warren Grigsby, late
201 of your bailiwick, you cause to be made the sum of five thousand dollars, with interest thereon at the rate of six per cent. per annum from the 24th day of October, 1857, until paid. Also the further sum of $250 re-exchange thereon and one dollar costs of protest which the president, directors, & company of the Bank of Louisville, late in our Fayette circuit court recovered against them. Also $60.61, which to the said bank of Louisville in our said court, was adjudged for its costs by it about its suit in this behalf expended, whereof the said Richard Apperson, &c. are convict, as appears to us of record, and that you have the same before the judge of our said court at the court-house in Lexington, on the 4th Monday in November next, to satisfy and pay the said debt, int., and costs aforesaid, and have there then this writ.

Witness John B. Norton, clerk of our said court at the court-house aforesaid this 10th day of October, 1860, and in the 69' year of the Commonwealth.

Att:

JOHN B. NORTON, *C. F. C. C.*

Came to hand October 17th, 1860, at 4 o'clock p. m.

W. J. FIELDS, *S. C. C.*

202 By order of James M. Sumers, att'y, this fi fa. is levied upon all the right, title, and interest that Richard Apperson may have in land Carter County, and advertised to sell at the court-house door in the town of Grayson, on the 12th day of November, 1860.

Att.: W. J. FIELD, *S. C. C.*

No sale for want of bidders this Nov. 12th, 1860.

W. J. FIELDS, *S. C. C.*

Returned and advertised to sell at the court-house door in the town of Grayson on the 10th day of Dec'r, 1860, this Nov'r 12th, 1860.

W. J. FIELDS, *S. C. C.*

There is no sale for want of bidders December 10th, 1860.

W. J. FIELDS, *S. C. C.*

Another execution issued herein against the same parties on the 17th day of November, 1859, and directed to the sheriff of Carter County, which has never been returned and which if acted on this will not be.

Att.: JOHN B. NORTON, *C.*

There was no appraisement of the land because there could no person found that 'new of any land that belong to said Apperson that had not been sold heretofore.

Dec'r 10, 1860.

203 W. J. FIELD, *S. C. C.*

The Commonwealth of Kentucky to the sheriff of Carter County, greeting:

You are hereby commanded that of the estate of Richard Apperson, Isaac Shelby, Edmund H. Taylor, jun'r, & J. Warren Grigsby, late of your bailiwick, you cause to be made the sum of five thousand dollars, with interest thereon, at the rate of six per cent. per annum from the 24th day of October, 1857, until paid; also the further sum of two hundred and fifty dollars re-exchange thereon, and also one dollar, costs of protests, which the Bank of Louisville, late of our Fayette circuit court recovered against them; also $61.60, which, to the said Bank of Louisville, in our said court, was adjudged for its costs by it about its suit in this behalf expended, whereof the said Apperson, Shelby, Taylor, jr., & Grigsby, are convict, as appears to us of record, and that you have the same before the judge of our said court at the court-house in Lexington, on the 4th Monday in January next, to satisfy and pay the said debts, interest, and costs aforesaid.

And have then and there this writ.

204 Witness John B. Norton, clerk of our said court, at the court-house aforesaid, this 28th day of November, 1865, and in the 74th year of the Commonwealth.

JOHN B. NORTON,
C. F. C. C.

No property found to make the within debt, or any part thereof.

January 1st, 1866.

H. B. JAMS, *S. T. C.*

Cr. within by $190, of date May 13th, 1861, made by sheriff of Carter County, by sale of that date on former ex'on.

Att.: CHA'S F. LOWRY,
D. C. F. C. C.

The Commonwealth of Kentucky to the sheriff of Franklin County, greeting:

You are hereby commanded that of the estate of Richard Apperson, Isaac Shelby, Edmund H. Taylor, jr., & J. Warren Grigsby, late of your bailiwick, you cause to be made the sum of five thousand dollars, with

interest thereon at the rate of six per cent. per annum from the 24th day of Oct., 1857, until paid; also the further sum of $250.00, re-exchange, and $1.00, cost of protest, which the Bank of Louisville, late in
205 our Fayette circuit court, recovered against them; also $62.60, which, to the said bank, in our said court, was adjudged for its costs by it about its suit in this behalf expended, whereof the said Apperson, Shelby, &c., are convict, as appears to us of record, and that you have the same before the judge of our said court at the court-house in Lexington on the 4th Monday in November next, to satisfy and pay the said debts, interest, and costs aforesaid.

And have there then this writ.

Witness John B. Norton, clerk of our said court at the court-house aforesaid, this 2d day of October, 1867, and in the 76th year of the commonwealth.

JNO. B. NORTON,
C. F. C. C.

Credit within by $199, of date May 13th, 1861, made by sheriff of Carter County on former ex'on.

Att.

CHA'S F. LAWEY,
D. C. F. C. C.

No property found out of which to make this execution, or any part thereof.

Nov. 18th, 1867.

W. J. CHINN, *S. F. C.*

Petition.

Fayette circuit *circuit*.

THE PRESIDENT, DIRECTORS, & COMPANY OF the Bank of Louisville, plaintiffs,
against
JOHN MCLEAN & OTHERS, DEFENDANTS.

Interrogatories to be propounded to divers persons residing in
206 the city and State of New York, whose answers thereto are to be read as evidence on behalf of the plaintiffs in the above-entitled suit on the trial between them as pl'ffs, and R. Apperson as def't.

1st. Did you ever have in your possession a bill of exchange for $5,000 purporting to have been drawn by W'm F. Roelosson and addressed to John McLean, j'r, Cincinnati, O., and by him accepted, payable at the Bank of Commerce, city of New York, dated Cincinnati, 22d June, 1857, and payable four months after date to the order of Isaac Shelby, and by him and by Taylor, Shelby & Co., and by R. Apperson severally endorsed; if so, state when, from whom, and for what purpose did you receive it.

2nd. What did you do with the bill after you received it? If you presented it for payment, state where, when, and to whom you so presented it, and what reply did you receive upon such presentation; was it paid or was payment refused? You will answer especially, say whether the demand of payment was within the usual hours for demand of payment.

3rd. Was the said bill of exchange protested or not? If yea, when, by whom, and for what? Was any notice given of the demand of pay-

ment and of protest? If yea, by whom, and when, and how, and
207 to whom was such notice given, and what was the substance of the notice?

4th. Are you conversant with the commercial custom and usage in the city of New York in regard to the days of grace allowed upon bills of exchange? If yea, what is that custom and usage, and how many days of grace were by that custom and usage allowed on the bill aforesaid? When by said custom & usage was it due and payable?

5th. What is your occupation? If you know any other fact likely to be of service to the plaintiffs on the trial of the suit aforesaid you will please state it.

HARRISON & HUNT.
For Pl'ffs.

BANK OF LOUISVILLE
vs.
MCLEAN AND OTHERS.

The defendant Apperson propounds to the witnesses in New York and at Flemingsburg the following cross-interrogatories, to wit:

1st. As you have been asked to state what is the custom in New York as to the days of grace, I request you to state if the statute laws of New York have not recently changed that custom, and you will now please state what has been the law and what has been the custom of New York as to the days of grace since June, 1857.

2nd. If you protested the bill named in the interrogatories in
208 chief, did you send any notice of such protest to R. Apperson, or in any way notify him of that protest?

3rd. If you ever sent any notice of protest of said bill to R. Apperson at any time, state the time exactly, how you sent it, who had made the protest, what authority had such one for making any such protest, how did you come by the protest, and did you examine to see that the protest was duly copied.

4th. If you have any copy of the protest will you please file it with your answer to the foregoing interrogatories?

5th. Did you not know at the date of the protest, if there was one, that Richard Apperson lived in Mount Sterling, Kentucky?

True copies.
Att: JOHN B. NORTON, *C. F. C. C.*

Fayette cir. c't.

THE PRESIDENT, DIRECTORS, & COMPANY OF the Bank of Louisville, plaintiffs,
against
JOHN MCLEAN, J'R, & OTHERS, DEFENDANTS. } Petition.

The deposition of J. P. Giraud Foster, taken on the 31st day of July, 1858, at the office of Gibbs, Watson & Gibbs, No. 106 Broadway, in the city of New York, to be used as evidence in behalf of the plaintiffs in the foregoing action.

209 The defendant, being first duly sworn, in answer to the interrogatories and cross-interrogatories hereto annexed, defers as follows:

To the first interrogatory he answers. I did have that bill of exchange in my possession on the 24th day of October, 1857. I received it from

the Bank of America, the correspondent in this city of H. Powers, cashier of the holder at Flemingsburg, for the purpose of presenting the same for payment at the place of payment named therein, and to protest it for non-payment if payment was refused.

To the second interrogatory he answers. After I received the bill, and on said 24th day of October, 1857, I presented the same for payment at the Bank of Commerce, in the city of New York, to the paying teller of said bank, and demanded payment thereof, which was refused, the said paying teller stating that there were no funds in said bank to pay the same. The demand for payment was made within the usual business hours, and at the usual time for making demand for payment.

To the third interrogatory he answers. Said bill was by me pro-
210 tested for non-payment, I being at that time a notary public in and for the city and State of New York. Notice of the demand of payment and of the protest was given by sending notice that the bill had been protested for non-payment, which notice were sent by mail, prepared by stamps, addressed to the drawer and endorsers respectively, and inclosed in a notice addressed to H. Powers, cashier, Flemingsburg, Kentucky. These notices were mailed on the 26th day of October, 1857, before the closing of the afternoon mail on that day (the twenty-fifth being Sunday).

To the fourth interrogatory he answers. I am an attorney and counselor at law and a notary public. I know of no other matter or thing likely to be of service to the plaintiffs.

On his cross-examination, in answer to the cross-interrogatories in behalf of defendant Apperson, he deposes as follows:

To the first cross-interrogatory he answers. The custom is and has been for years to allow three days' grace on bills payable in this State, and the law has not changed the custom to this day.

211 To the second cross-interrogatory he answers. I sent a notice of the protest for non-payment to R. Apperson, a copy of which is hereto annexed, marked "Exhibit C."

To the third cross-interrogatory he answers. I sent a notice of protest addressed to R. Apperson by mail, enclosed in an envelope, prepaid by stamp, addressed to H. Powers, cashier, Flemingsburg, Kentucky, the holder of said bill of exchange. I sent it by mail on the 26th day of October, 1857. I myself made the protest in my capacity as notary public, as a notary public having possession of the bill. I had authority to protest it. I saw that the protest was properly made out.

To the fourth interrogatory he answers. A true copy of the protest is annexed to this my deposition, marked "Exhibit B." On the back thereof is a true copy of the bill of exchange, marked "Exhibit A."

To the fifth interrogatory he answers. I did not know where he lived.

J. P. GIRAUD FOSTER.

$5,000.] NEW YORK, *24th Oct.*, 1857.

Please to take notice that a bill of exchange or draft, drawn
212 by Wm. F. Roelosson on John McLean, jr., for five thousand dollars, dated June 22, 1857, due this day and endorsed by you, is protested for non payment, and that the holders look to you for the payment thereof.

Yours, &c.,

J. P. GIRAUD FOSTER,
Notary Public Bank of America, and Attorney at Law,
No. 69 Wall street.

To M. GIBBS, *N. P.*

Exhibit B.

EXHIBIT B.

UNITED STATES OF AMERICA, *State of New York, ss:*

On the 24th day of October, in the year of our Lord one thousand eight hundred and fifty-seven, at the request of the Bank of America, in the city of New York, I, J. P. Giraud Foster, a notary public, duly admitted and sworn, dwelling in the city of New York, did present the original bill of exchange or draft hereto annexed to the paying teller of the Bank of Commerce in the city of New York, and demand of him payment thereof, which he refused.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer, acceptor, and endorsers of said bill of exchange or
213 draft, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred, and to be hereafter incurred, for want of payment of the said bill of exchange or draft.

Thus done and protested in the city of New York aforesaid in the presence of John Doe and Richard Roe, witnesses.

In testimon'um veritatis.

[SEAL] J. P. GIRAUD FOSTER,
Notary Public, 69 *Wall street.*

M. GIBBS, *N. P.*

Exhibit B.

$5,000.] CINCINNATI, *June* 22d, 1857.

Four months after date pay to the order of Isaac Shelby five thousand dollars, value received, and charge the same to account of

W'M F. ROELOSSON.

To JOHN MCLEAN, JR., *Cincinnati, O.*

(Endorsed:) Isaac Shelby, Taylor, Shelby & Co., R. Apperson. Pay J. Purnett, esq'r., cash., or order. H. Powers, cash.

Exhibit A.

CITY, COUNTY, & STATE OF NEW YORK, *ss:*

I, Montgomery Gibbs, a notary public in and for said State, do certify that the foregoing deposition of J. P. Giraud Foster was taken
214 & was read to & subscribed by him in my presence at the time and place and in the action mentioned in the caption, the said Foster being by me first sworn to state the truth, the whole truth, and nothing but the truth in his evidence in said action, and his statement being reduced to writing by me in his presence, and neither party appearing by counsel or in person.

Given under my hand and official seal this 31st day of July, 1858.

[SEAL] MONTGOMERY GIBBS, *Notary Public.*

Petition.

Fayette circuit court.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Louisville, plaintiffs,
against
JOHN MCLEAN, JR., & OTHERS, DEFENDANTS.

The deposition of J. P. Giraud Foster, taken on the 26th day of July, 1858, at the office of Gibbs, Watson & Gibbs, No. 106 Broadway, in the city of New York, to be read as evidence on behalf of the plaintiffs in the foregoing action.

The deponent being first duly sworn, deposes as follows:

My name is J. P. Giraud Foster. I am a notary public in &
215 for the city & State of New York, and such during the month of October, 1857. On the 24th day of October, 1857, it being Saturday, I had in my possession a bill of exchange for five thousand dollars, drawn by W'm F. Roelosson, addressed to John McLean, j'r, Cincinnati, Ohio, and by him accepted, payable at the Bank of Commerce, in the city of New York, four months after its date, to wit, June 22d, 1857, and endorsed by Isaac Shelby, Taylor, Shelby & Co., and by R. Apperson, a true copy of which bill is annexed to this my deposition, marked "A."

On the said 24th day of October I presented the said original bill of exchange to the paying-teller of the Bank of Commerce in the city of New York during business hours at said bank, and demanded payment thereof, which demand was refused. I then, on the same day, protested the same for non-payment.

On the 26th day of October, 1857, notices stating that said bill of exchange was protested for non-payment, and that the holders thereof would look to them for the payment thereof, were by me deposited in the post-office at the city of New York, postage paid, addressed as follows, to the drawers and endorsers of said bill respectively, enclosed in
216 a notice addressed to the holder of said bill, H. Powers, cashier, Flemingsburg, Kentucky, copy of said notice is hereto annexed, marked Exhibit "C."

By the commercial custom and usage in the State of New York three days of grace are allowed on bills payable in said State, except when the third day of grace falls upon Sunday or a public holiday, in which cases the bill is payable on the second day of grace.

The paper annexed to this my deposition, marked "Exhibit B," is a true copy of my certificate of protest in this case.

J. P. GIRAUD FOSTER.

UNITED STATES OF AMERICA,
State of New York, ss:

On the 24th day of October, in the year of our Lord one thousand eight hundred and fifty-seven, at the request of the Bank of America, in the city of New York, I, J. P. Giraud Foster, a notary public, duly admitted and sworn, dwelling in the city of New York, did present the original bill of exchange or draft hereto annexed to the paying-teller of the Bank of Commerce, in the city of New York, and demanded
217 of him payment thereof, which he refused. Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest as well against the drawer, acceptor, and endorser of said bill of exchange or draft as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred for want of payment of the said bill of exchange or draft.

Thus done and protested in the city of New York aforesaid, in the presence of John Doe and Richard Roe, witnesses. In testimonium veritatis.

[SEAL.] J. P. GIRAUD FOSTER,
Notary Public.

M. GIBBS, *N. P.*
Exhibit B.

$5,000.] CINCINNATI, *June 22d*, 1857.

Four months after date pay to the order of Isaac Shelby five thousand dollars and charge the same to account of

W'M F. ROELOSSON.

To JOHN MCLEAN, J'r,
Cincinnati, O.

Exhibit A.

(Endorsed:) Isaac Shelby, Taylor, Shelby & Co. R. Apperson. Pay J. Purnett, cash., or order. H. Powers, cash.

218 $5,000.] NEW YORK, *Oct.* 24, 1857.

Please to take notice that a bill of exchange or draft drawn by W'm F. Roelosson on John McLean, jr., for five thousand dollars, dated June 22d, 1857, and endorsed by you, is protested for non-payment, and that the holders look to you for the payment thereof.

Yours, &c.,

J. P. GIRAUD FOSTER.
Notary Public and Attorney at Law.

To M. GIBBS, *N. P.*
Exhibit C.

CITY, COUNTY, & STATE OF NEW YORK:

I, Montgomery Gibbs, a notary public in and for said State, do certify that the foregoing deposition of J. P. Giraud Foster was taken and was read to and subscribed by him in my presence at the time and place & in the action mentioned in the caption, the said Foster being by me first sworn to state the truth, the whole truth, and nothing but the truth in the evidence in said action, and his statements being reduced to writing by me in his presence and neither party appearing either by counsel or in person.

Given under my hand and official seal this 26th day of July, 1858.

MONTGOMERY GIBBS,
Notary Public.

21 *Petition.*

Fayette circuit court.

THE PRESIDENT, DIRECTORS, & COMPANY OF the Bank of Louisville, plaintiffs,
against
JOHN MCLEAN & OTHERS, DEFENDANTS.

The deposition of J. P. Giraud Foster, taken on the 31st day of July, 1858, at the office of Gibbs, Watson & Gibbs, No. 106 Broadway, in the city of New York, to be used as evidence on behalf of the plaintiffs in the foregoing action.

The defendant, being first duly sworn, deposes as follows:

My name is J. P. Giraud Foster. I am of lawful age and reside in the city of New York; I am a notary public in and for New York, and was such on the 24th day of October, 1857. On that day I had in my possession the original bill of exchange drawn by W'm F. Roelosson on John McLean, jr., for $5,000.00, a copy of which is annexed to this my deposition & marked "Exhibit A."

On the said 24th day of October, 1857, I presented the said original bill to the paying teller of the Bank of Commerce in the city of New

York, during business hours at the said bank, and demanded payment thereof, which was refused. I thereupon, on the same day, protested the same for non-payment.

220 On the 26th day of October, 1857, notices stating that said bill of exchange had been protested for non-payment, and that the holders thereof would look to them for the payment thereof, were by me deposited in the post-office at the city of New York, postage paid by stamps, addressed as follows, to the drawers and endorsers thereof, respectively, enclosed in a notice addressed to the holder of said bill of exchange, H. Bowman, cashier, at Flemingsburg, Kentucky. A copy of this notice is hereto annexed marked "Exhibit C."

By the commercial custom and usage in the State of New York, three days of grace are allowed upon bills payable in said State, except in cases where the third day of grace falls upon Sunday or upon a public holiday, in which cases bills are payable on the second day of grace.

The paper annexed to this, my deposition, marked "Exhibit B," is a copy of the certificate of protest in this case.

J. P. GIRAUD FOSTER.

UNITED STATES OF AMERICA,
State of New York, ss:

221 On the 24th day of October, in the year of our Lord one thousand eight hundred and fifty-seven, at the request of the Bank of America, in the city of New York, I, J. P. Giraud Foster, a notary public duly admitted and sworn, dwelling in the city of New York, did present the original bill of exchange or draft hereto annexed to the paying teller of the Bank of Commerce in the city of New York, and demanded of him payment thereof, which he refused.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest as well against the drawer, acceptor, and endorsers of the said bill of exchange or draft, as against all others whom it doth or may concern, for exchange, re-exchange and costs, damages and interests already incurred and to be hereafter incurred for want of payment of the said bill of exchange or draft.

Thus done and protested in the city of New York aforesaid, in the presence of John Doe and Richard Roe, witnesses.

In testimonium veritatis.

J. P. GIRAUD FOSTER,
Notary Public.

M. GIBBS, *N. P.*

Exhibit B.

$5,000.] CINCINNATI, *June 22d*, 1857.

222 Four months after date pay to the order of Isaac Shelby five thousand dollars, value received. Charge the same to account of—
WM. F. ROELOSSON.

To John McLean, jr.

(Across the face:) Accepted payable at Bank of Commerce, New York City. John McLean, jr.

(Endorsed:) Isaac Shelby, Taylor, Shelby & Co., R. Apperson. Pay J. Burnett, cash., or order. H. Powers, cash.

$5,000.] NEW YORK, *24th Oct.*, 1857.

Please to take notice, that a bill of exchange or draft, drawn by Wm. F. Roelosson on John McLean, jr., for five thousand dollars, dated Cin-

cinnati, June 22d, 1857, and endorsed by you, is protested for non-payment, and that the holders look to you for the payment thereof.

Yours, &c.,

J. P. GIRAUD FOSTER,
Notary Public and Attorney at Law.

To M. GIBBS, *N. P.*

Exhibit C.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

I, Montgomery Gibbs, notary public in and for said State, do certify that the foregoing deposition of J. P. Giraud Foster was taken and was read to and subscribed by him in my presence at the time and place and in the action mentioned in the caption, the said J. P. Giraud
223 Foster being by me first duly sworn to state the truth, the whole truth, and nothing but the truth in his evidence in said action, and his statements being reduced to writing by me in his presence, neither party appearing by counsel or in person.

Given under my hand and seal this 31st day of July, 1858.

MONTGOMERY GIBBS,
Notary Public.

Fayette circuit court.

THE PRESIDENT, DIRECTORS, & COMPANY OF the Bank of Louisville, plaintiffs,
against
JOHN MCLEAN, JR., AND OTHERS, DEFENDANTS,

The deposition of N. S. Andrews, taken on the 7th day of August, 1858, at the Branch Bank of Louisville at Flemingsburg, to be read as evidence on the trial of a suit pending in the Fayette circuit court, in which the president, directors, & company of the Bank of Louisville are plaintiffs, and John McLean, j'r, and others are defendants.

Deponent being of lawful age, and first duly sworn, says:

A bill of exchange for five thousand dollars drawn by Wm. F. Roelosson on John McLean, j'r, and accepted by said McLean, and endorsed by Isaac Shelby, Taylor, Shelby & Co., and Richard Apperson, dated June 22d, 1857, at four months' date, was purchased by the Branch
224 Bank of Louisville at Flemingsburg, K'y, on the 10th day *day* of August, 1857. When presented to the bank for purchase it was not endorsed by Richard Apperson, but was then endorsed by him, and the proceeds was paid to him the said Apperson. The bill was addressed to John McLean, j'r, at Cincinnati, Ohio, but accepted across the face of it by said John McLean, j'r, and either just above his name or in the body of the bill it was made payable at some bank in the city of New York; this bill matured in the city of New York, Oct. 22, 1857, and was protested, & on the 30th day of October, 1857, upon the arrival of the mail, say about 11 o'clock, notice of protest of said bill was received, and deponent addressed a notice to the drawer and acceptor and prepayed the postage and put in the post-office at Flemingsburg, K'y, one hour after their receipt, addressed to them at Cincinnati, Ohio, and at the same time deponent put in the post-office at Flemingsburg a notice of protest, postage prepaid, addressed to Taylor, Shelby & Co., and Isaac Shelby, addressed to Lexington, K'y, and on same day one for Richard Apperson, prepayed postage, addressed to him at Mount Sterling, K'y. Deponent finds from the letter-book of the bank that

this bill was sent to J. Purnett, esqr., cashier of the Bank of
225 America, New York, on the 21st day of August, 1857, and deponent finds among the letters J. Purnett's letter acknowledging the receipt of the bill, dated New York, August 27th, 1857. Deponent finds, also, a letter from J. Purnett, cashier, dated Oct. 26th, 1857, at New York, returning the above-described bill as protested on the 31st day of October, 1857. Deponent received duplicate notice of protest of said bill and mailed them as above stated, and prepaid the postage on all, say to the drawer and acceptor at Cincinnati, Ohio, Isaac Shelby and Taylor Shelby & Co., at Lexington, K'y, and Richard Apperson, at Mount Sterling, K'y. When this bill was purchased by this bank H. Powers was cashier, who has since resigned and left the State, and D. K. Stockton was appointed in his place. Deponent is and has been clerk of the Branch Bank of Louisville at Flemingsburg ever since it was established.

N. S. ANDREWS.

I, Hiram Wallingford, examiner for Fleming County, do certify that foregoing deposition of N. S. Andrews was taken before me, and was read to and subscribed by him in my presence at the time and place and in the action mentioned in the caption, the said Andrews
226 having been first sworn by me that the evidence he should give in the action should be the truth, the whole truth, and nothing but the truth, and his statements reduced to writing by me in his presence, neither party in person being present at the examination.

Given under my hand this 7th day of August, 1858.

HIRAM WALLINGFORD,
Examiner.

Fayette circuit.

STATE OF KENTUCKY, *ss:*

I, J. B. Rodes, clerk of the court for the circuit aforesaid, do certify that the foregoing forty-two pages and upwards contains a full, true and complete transcript of the record and proceedings had in the case mentioned in the caption thereof.

Given under my hand this 5th day of June, 1872.

Att.:

J. B. RODES, *Clerk.*

The counter state' of facts on claim of R. Apperson is as follows:

Counter statement of facts on claim of R. Apperson, jr.

Before James A. Beattie, esq'r., master.

C. W. PURCELL, &c.,)
vs.)
J. WARREN GRIGSBY, &c.)

Counter statement.

Complainants for counter statement to the state' of facts pre-
227 sented by R. Apperson, jun'r, say that it is not true that the bill of exchange drawn by W'm F. Roelosson on Jno. McClellan, jun'r, in favor of Isaac Shelby and endorser by Taylor, Shelby & Co., came into the hands of said Taylor, Shelby & Co, and was endorsed or nego-

tiated by them after the 14th day of July, 1857. They deny that said Apperson is entitled to prove any debt against the fund in this case.

W. O. HARRIS,
For Compl'ts.

The sworn state' of facts of W. H. Thomas, with five other papers referred to in the master's report, are as follows:

Statement of facts on claim of W. H. Thomas.

Circuit court of the United States for the district of Kentucky.

Before Master Comm'r James A. Beattie.

C. W. PURCELL & OTHERS
vs.
J. W. GRIGSBY AND OTHERS.

State' of facts and claims of W. H. Thomas.

W. H. Thomas says that on the 27th day of August, 1858, the firm of McClellan, Chenault & Co., composed of Noah H. McClellan, Wailer Chenault, John Burnside, and J. B. Dunn, recovered a judgment in the Fayette circuit court in the State of Kentucky against the firm of Taylor, Shelby & Co., composed of Edmund Taylor, j'r, Isaac Shelby, and J. Warren, Grigsby, for the sum of five thousand one hundred and forty-five dollars and their costs therein expended. That said costs
228 amounted to $13.05. That by the laws of Kentucky said judgment bears interest from its date at the rate of 6 per cent. per annum. That the debt on which the said judgment was obtained was created since the 14th day of July, 1857. That sundry executions issued upon said judgment, upon one of which was made and credited on said judgment on the 7th day of Jan'y, 1867, the sum of two hundred and eleven $\frac{50}{100}$ dollars, and on another the sum of two hundred and twenty-seven $\frac{50}{100}$ dollars on the 1st day of July, 1867, all of which appears from a certified transcript of the record of said judgment herewith filed as part hereof. That by a suit in the State of Minnesota the sum of nine hundred and eighty dollars was made and credited on the 10th day of May, 1869. That by a suit in the Louisville chancery court against the ex'or and legatees of W'm Shause the sum of four thousand dollars was made and credited on said judgment on the 6th day of January, 1873. That the whole remainder of said judgment is due and unpaid and is not entitled to any just offset or discount. That Noah H. McClellan
229 retired from the firm of McClellan, Chenault & Co., & it' business was afterwards carried on by the others members in the name of Chenault & Co. That thereupon the entire assets of the former firm became vested in the firm of Chenault & Co., and among others the claim against Taylor, Shelby & Co. upon which said judgment was rendered. That afterwards Waller Chenault departed this life and John Burnside and J. B. Dunn, the surviving partners of said firm, together with W. O. Chenault, adm'r of said Waller, on the 4th of December, 1871, assigned the said judgment to this claimant, subject to certain contracts theretofore made with James A. Grinstead, of Lexington, as appears from the said assignment herewith filed as part hereof. That on the 10th day of January, 1872, the said suit on said judgment in the Louisville chancery court was pending, and on that day James A. Grin-

stead released to claimant his lien on the said judgment and all claim whatever which he had on the same, as appears from his said release herewith filed.

Wherefore the said W. H. Thomas claims that he be allowed the balance due on said judgment or his distributable share thereof against the trust-fund in this case, and that the said claim be reported
230 to the court as allowed.

H. C. PINDELL,
For Claimant.

W. H. Thomas, being duly sworn according to law, states that the facts set out and allegations made in the foregoing statement are true, as he believes.

WM H. THOMAS.

Subscribed and sworn to before me by W. H. Thomas this 31st day of January, A. D. 1873.

JAMES A. BEATTIE,
Master Commissioner.

LOUISVILLE, K'Y, *Jan'y 10th*, 1872.

I hereby release to W. H. Thomas my lien on the judgment in favor of McClellan, Chenault & Co. vs. Taylor, Shelby & Co., on which a suit is pending in the Louisville chancery court, and all whatever I have on the same.

JAMES A. GRINSTEAD.

We, the undersigned, W. O. Chenault, adm'r of Waller Chenault, dec., J. B. Dunn, & John Burnside, agree to sell our entire claim we hold against Taylor, Shelby & Co., subject to the contracts made with James Grinstead, of Lexington, Kentucky, for the sum of sixteen hundred dollars paid to us by W. H. Thomas, which claim we resign, with its advantages and encumbrances, to the said W. H. Thomas without any recourse whatever.
231

W. O. CHENAULT, *Adm'r.*
J. B. DUNN.
JOHN BURNSIDE.

Affidavit as to the claim of W. H. Thomas.

Circuit court of the United States for the district of Kentucky.

Before Master Commissioner Ja's A. Beattie.

C. W. PURCELL & OTHERS
vs.
J. W. PURCELL & OTHERS.

J. W. Grigsby, being duly sworn, deposes and says he was announced in the newspapers of Lexington on the 14th day of July, 1857, as a partner of the firm of Taylor, Shelby & Co., and was not a partner or in any way connected with the said firm before that date.

J. W. GRIGSBY.

Subscribed and sworn to before me by J. W. Grigsby this 31st day of January, A. D. 1873.

JAMES A. BEATTIE,
Master Com'r.

Affidavit as claim of W. H. Thomas.

Circuit court of the United States for the district of Kentucky.

Before Master Commissioner Ja's A. Beattie.

J. W. PURCELL ET AL.)
vs.
J. W. GRIGSBY, &C.)

E. Boyle Owsley, being duly sworn, says that he is acquainted with the signature of John Burnside, and that he has seen him write. He believes his name appended to the exhibit herein, marked "H. C. P.,
232 B," is in the handwriting of said Burnside and his true and genuine signature.

E. B. OWSLEY.

Subscribed and sworn to by E. Boyle Owsley before me this 31st day of January, A. D. 1873.

JAMES A. BEATTIE,
Master Com'r.

Affidavit as to claim of W. H. Thomas.

Circuit court of the United States for the district of Kentucky.

Before Master Com'r James A. Beattie.

C. W. PURCELL)
vs.
J. WARREN GRIGSBY.)

H. C. Pindell, being first duly sworn deposes and says, that he is well acquainted with the handwriting of James A. Grinstead and has often seen him write. That the name of said Grinstead to a paper purporting to be a release to W. H. Thomas of his lien on the judgment in favor of McClellan, Chenault & Co. vs. Taylor, Shelby & Co. and all claim whatever which he had on the same, which is filed herein marked "H. C. P., A," is the handwriting of said Grinstead.

He further deposes and says, that J. B. Dunn did deliver to him the paper herein filed and marked "H. C. P., B," purporting to be an assignment of the entire claim of W. O. Chenault, adm'r of Waller Che-
233 nault, deceased, J. B. Dunn, and John Burnside vs. Taylor, Shelby & Co., in the presence of W. H. Thomas and for his benefit, and acknowledge the same to be his act and deed.

He further deposes, that on the 10th day of January, 1872, a suit was pending in the Louisville chancery court on the judgment of the Fayette circuit court in favor of McClellan, Chenault & Co. vs. Taylor, Shelby & Co., upon which the claim of W. H. Thomas in this case is based. That the deponent knows this fact because he was attorney for the plaintiffs in said suit, the same having been brought by John Burnside and J. B. Dunn as surviving partners of the firm of Chenault & Co. against the ex'r and legatees of W'm Shause.

H. C. PINDELL.

Subscribed and sworn to before me by H. C. Pindell, this 31st day of January, A. D. 1873.

JAMES A. BEATTIE,
Master Commissioner.

Fayette circuit court.

STATE OF KENTUCKY:

Please held before the honorable W. C. Goodloe, judge of the court for the circuit aforesaid, at the court-house in the city of Lexington, on the 27th day of August, 1858.

234 *Petition.*

WALLER CHENAULT, NOAH H. MCCLELLAND, John Burnsides, & J. B. Dunn, plaint's
against
EDMUND H. TAYLOR, JUN'R, ISAAC SHELBY, J. Warren Grigsby, and W'm Shause, defendant.

The plaintiffs states that they are partners doing business under the style of McClellan, Chenault & Co., and as such had a large sum of money, to wit: four thousand nine hundred and seventy-five dollars & $\frac{71}{100}$, which they deposited with Taylor, Shelby & Co., bankers, of the city of Lexington. That when the deposit was made, said banking firm was composed of E. H. Taylor, jun'r, Isaac Shelby, and William Shause; but afterwards William Shause went out of the firm, and J. W. Grigsby came into the firm taking the place of Shause, the name of the firm being and remaining unchanged. The pl'ffs claim that all the debts are liable to them for said deposit, but at any rate that William Shause is liable for the amount.

The plaintiffs further state the firm of McClellan, Chenault & Co. has dis'olved, and on the dis'olution N. H. McClelland was largely indebted to the firm, and is insolvent, and that he has no interest or title in said deposit, he having used the funds of the concern more than the
235 full amount of his whole interest. The defendants refuse to pay to plaintiffs said deposit, but claim offset or apply it in payment of an individual debt due by N. H. McClelland to def'ts. Wherefore they pray judgment for said deposit, with interest and other proper relief.

ROBINSON & JOHNSON.

Waller Chenault, one of the firm of McClelland, Chenault & Co., states that he believes the statements in the above petition to be true.

WALLER CHENAULT.

Sworn to before me this 12th day of January, 1858.
Att.:

JOHN B. NORTON, *C. F. C. C.*

The commonwealth of Kentucky to the sheriff of Fayette County greeting:

You are commanded to summon Edmund H. Taylor, jun'r, Isaac Shelby, J. Warren Grigsby, and William Shause to answer on the first day of the next February term of the Fayette circuit court, a petition filed against them in said court by Waller Chenault, Noah H. McClelland, John Burnside, & J. B. Dunn, and warn them that upon their failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next February term of said court.

Witness John B. Norton, clerk of said court, this 12th day of January, 1858.

Att.: JOHN B. NORTON, *C. F. C. C.*

236 Executed January 12th, 1858, by delivering to E. H. Taylor and I. Shelby a true copy of the within summons.

W. R. DUDLEY, *D. S.*,
For A. F. DUDLEY, *S. F. C.*

The Commonwealth of Kentucky to the sheriff of Woodford Co., greeting:

You are hereby commanded to summon Edmund H. Taylor, jun'r, Isaac Shelby, J. Warren Grigsby, and W'm Shause, to answer, on the first day of our next February term of the Fayette circuit court, a petition filed against them in said court by Waller Chenault, Noah H. McClelland, John Burnsides, and J. B. Dunn, and warn them that upon their failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons on the first day of the next February term of said court.

Witness John B. Norton, clerk of said court, this 12th day of January, 1858.

Att': JOHN B. NORTON, *C. F. C. C.*

To be executed on def't W'm Shouse only.

237 Executed January 15, 1858, on the within-named W'm Shouse, by delivering him a true copy of the within.

W'M W. GEORGE, *S. W. C.*

The Commonwealth of Kentucky to the sheriff of Lincoln Co., greeting:

You are commanded to summon Edmund H. Taylor, jun'r, Isaac Shelby, J. Warren Grigsby, and W'm Shause, to answer, on the first day of the next February term of the Fayette circuit court, a petition filed against them in said court by Waller Chenault, Noah H. McClelland, John Burnsides, and J. B. Dunn, and warn them that upon their failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons on the first day of the next February term of said court.

Witness John B. Norton, clerk of said court, this 12th day of January, 1858.

Att': JOHN B. NORTON, *C. F. C. C.*

Endorsed as follows:

To be executed on the def't Grigsby only.

Executed on J. Warren Grigsby Jan. 22, 1858, by delivering him a copy of the within.

J. P. BAILEY, *D. S.*,
For E. B. CALDWELL, *S. L. C.*

And afterwards, to wit, on the 19th day of January, 1858, the answer and cross-petition of Taylor, Shelby & Co. was filed, viz:

238 The defendants, Edmund H. Taylor, j'r, Isaac Shelby, and J. Warren Grigsby, partners, trading under the name of Taylor, Shelby & Co., admit that on the day of they had on deposit $

of moneys to the credit of the firm of McClelland, Chenault & Co. That on said day Noah H. McLelland, the managing partner of said firm, consented and directed that the said balance should be applied to the payment of certain bills of exchange held by the plaintiffs, and on which said Noah was liable. That the defendants, agreeably to said consent and direction, did hold and claim, and do still hold and claim, the said balance as having been paid or directed to be paid on said bill. They state that with a view to prevent any risk of loss or liability on their part, they did not surrender said bill of exchange at the time said balance was directed to be applied to them, and they still hold the same, as follows, to wit:

No. 1. A bill drawn and accepted by Noah H. McClelland in favor of one John M. Hunt for $3,496.73, dated Lexington, Jan. 22, 1857, and payable ninety days after date, and assigned by written endorsement thereon by said Hunt to the def'ts. Said bill was regularly presented for payment at its maturity, which was refused, and the bill
239 was protested and due notice given all the parties thereto. Said bill of exchange has been filed with the petition in a suit instituted in this court against said McLelland and Hunt, and the same is hereby referred to.

2d. A bill of exchange drawn by one William N. Yates on Noah H. McClelland, and by him accepted in favor of one William D. Ranger, for $1,615, dated Lexington, March 26th, 1857, payable ninety days after date, and assigned, by written endorsement of said Ranger, to these defendants. That said bill was duly presented for payment at its maturity, and payment being refused, the same was protested and due notice thereof given to all the parties thereto. Said bill is on file in the suit instituted in this court by these defendants against said Ranger, Yates, and McLelland. Defendants say that if they are not entitled to hold said balance of deposit in payment of said bills of exchange, then the said bills of exchange are wholly unpaid; and they make said Noah H. McLelland and John M. Hunt parties defendant to this answer as a cross-petition, and pray judgment against them for the amount of said bill No. 1, to wit: $3,496.73, with interest from its maturity, damages and costs; and they make said William M. Yates, William D. Ranger, and Noah H. McLelland defendants hereto as a cross-petition,
240 and pray judgment against them for the amount of said bill No. 2, to wit: $1,615, with interest from its maturity, damages and costs, and for all other proper relief.

BUCKNER & DUDLEY.
R. W. WOOLLEY.

The commonwealth of Kentucky to the sheriff of Fayette County, greeting:

You are commanded to summon Waller Chenault, Noah H. McClelland, John Burnsides, J. B. Dunn, John M. Hunt, William M. Yates, and William D. Ranger to answer, on the first day of the next February term of the Fayette circuit court, an answer and cross-petition filed against them in said court by Edmund H. Taylor, jr., Isaac Shelby, and J. Warren Grigsby, partners trading under the name of Taylor, Shelby & Co., in the ordinary action of Waller, Chenault, & others, plaintiffs, against Taylor, Shelby & Co., def's, and warn them that upon their failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons on the first day of the next Feb'y term of said court.

Witness John B. Morton, clerk of said court, this 19th day of January, 1858.

241 Att.: JOHN B. NORTON, *C. F. C. C.*

Executed Jan'y 21st, 1858, on Waller Chenault, W. M. Yates, W. D. Ranger, and J. B. Dunn, by delivering to each of them a true copy of the within summons.

THO'S D. CARR, *D. S.*,
For A. F. DUDLEY, *S. F. C.*

And afterwards, to wit, on the 19th day of February, 1858, the defendants, Taylor, Shelby & Grigsby, this day filed an amended answer herein, to which Ed. Crowly made oath, which is noted.

And afterwards, to wit, at a court continued and held, for the circuit aforesaid, on the 26th day of February, 1858, on motion of the plaintiff, it is ordered that this case be transferred to the equity docket.

And afterwards, to wit, at a court continued and held for the circuit aforesaid, on the 27th day of February, 1858, by agreement of parties, it is ordered that this case be transferred to the common docket.

242 Alias summons on cross-petition to August term, 1858, is as follows, to wit:

The commonwealth of Kentucky to the sheriff of Fayette County, greeting:

You are again commanded to summon Waller Chenault, Noah H. McClelland, John Burnsides, J. B. Dunn, John W. Hunt, William M. Yates and William D. Ranger to answer, on the first day of the next August term of the Fayette circuit court, an answer and cross-petition filed against them in said court by Edmund H. Taylor, jr., Isaac Shelby & J. Warren Grigsby, partners trading under the name of Taylor, Shelby & Co., and warn them that upon their failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons on the first day of the next August term of said court. Witness John B. Morton, clerk of said court, this 10th day of March, 1858.

Att. JOHN B. NORTON, *C. F. C. C.*

(Endorsed:) To be executed on the defendant, McClelland, only.

Executed March 10th, 1858, by delivering to N. H. McClelland a true copy of the within summons.

W'M R. DUDLEY, *D. S.*,
For A. F. DUDLEY, *S. F. C.*

243 And afterwards, to wit, at a court continued and held for the circuit aforesaid on the 16th day of August, 1858, the parties appeared by their attorneys, and thereupon a jury, viz, Thomas W. Goodloe, William T. Hughes, George W. Dozier, Thomas Owen, James H. Kerr, David Hart, Solomon Law, S. D. Bruce, J. W. Cannon, William Dawns, William E. Bell, and James Hanna, who were sworn to try the issue. The trial progressed, but not having time to finish the same, the jury adjourned until nine o'clock to-morrow morning.

And afterwards, to wit, at a court continued and held for the circuit aforesaid on the 27th day of August, 1858, the parties appeared by their attorneys, and the jury empannelled and sworn herein met pursuant to adjournment. The trial progressed, and being finished, the jury returned the following verdict, viz:

We of the jury find for the plaintiffs five thousand one hundred and forty-nine dollars in damages.

THOMAS W. GOODLOE.

Wherefore it is adjudged by the court that the plaintiffs, Waller
244 Chenault, Noah H. McClelland, John Burnsides, and J. B. Dunn, recover of the defendants, Edmund H. Taylor, jr., Isaac Shelby, J. Warren Grisby, and W'm Shause, five thousand one hundred and forty-five dollars, the damages by the jurors aforesaid in their verdict herein assessed, and also their costs herein expended. Execution upon the foregoing judgment is stayed until the payment of the jury fee required by law.

And afterwards, to wit, at a court continued and held for the circuit aforesaid on the 18th day of September, 1858, by the consent of all parties, it is ordered that the issue of the liabilites of defendants, Hunt and Ranger, upon the several bills of exchange set forth and described in the answer and cross-petition of Taylor, Shelby & Co. be withdrawn from the jury, and that a trial be had upon the other issues made by the pleadings. Immediately upon the calling of this case at the August term the above order was directed to be entered. The clerk having through mistake failed to enter it when made, it is ordered to be entered now, to have the same effect as if it had been entered at the proper time.

Execution that issued December 5 is as follows:

The commonwealth of Kentucky to the sheriff of Fayette County, greeting:

245 You are commanded that of the estate of Edmund H. Taylor, jr., Isaac Shelby, J. Warren Grigsby, and William Shause, late of your bailiwick, you cause to be made the sum of five thousand one hundred and forty-nine dollars in damages, with interest thereon at the rate of six per cent. per annum from the 17th day of August, 1858, until paid, which Waller Chenault, Noah H. McClelland, John Burnsides, and J. B. Dunn, late in our Fayette circuit court, recovered against them; also $13.05 which to the said Waller Chenault, &c., in our said court was adjudged for their costs by them about their suit in this behalf expended, whereof the said Taylor, Shelby, *Shelby*, Grigsby, and Shouse are convict, as appears to us of record, and that you have the same before the judge of our said court, at the court-house in Lexington, on the 4th Monday in January next, to satisfy and pay the said debt, interest, and costs aforesaid, and have there then this writ.

Witness John B. Norton, clerk of our said court, at the court-house aforesaid, this 5th day of December, 1865, and in the 74th year of the commonwealth.

JOHN B. NORTON, *C. F. C. C.*

The sheriff of Fayette County will return this fi. fa. forthwith "No property found."

JAMES A. GRINSTEAD, *Agent.*

246 Returned by order of plaintiff's agent, this date, on above instruction. No property found out of which to make this fi. fa. or any part thereof.

W. W. DOWDEN, *S. F. C.*

The commonwealth of Kentucky, set., to the sheriff of Hickman County, greeting:

You are commanded that of the estate of Edmund H. Taylor, jr., Isaac Shelby, J. Warren Grigsby, and William Shause, late of your bailiwick, you cause to be made the sum of five thousand one hundred and forty-nine dollars in damages, with interest thereon at the rate of six per cent. per annum from the 17th day of August, 1858, until paid, which Waller Chenault, Noah H. McClelland, John Burnsides, and J. B. Dunn late in our Fayette circuit court recovered against them; also the sum of $13.65 which to the said Waller Chenault, &c., in our said court was adjudged for their costs by them about their suit in this behalf expended, whereof the said Taylor, Shelby, &c., are convict, appears to us of record, and that you have the same before the judge of said court, at the court-house in Lexington, on the 4th Monday in January next, to satisfy and pay the said damages, interest, and costs aforesaid, and have there then this writ.

Witness John B. Norton, clerk of our said court, at the court-
247 house aforesaid, this 29th day of November, 1866, and in the 75 year of commonwealth.

JNO. B. NORTON, *C. F. C. C.*

Levied Dec. 4th, 1866, on the right, title, and interest of Isaac Shelby in lots 245 & 246 in the plan of Columbus, Ky.; also in two *lots* known on original in same, known as the up'er half of No. 43, and all of 47 (the first 50 feet front by 200 deep); also on lots No. 180 and 187, known on the plan of Ky. City; all of which was conveyed by E. H. Taylor & wife to Isaac Shelby, as the property of said Shelby.

WM. M. SAMUELS, *S. H. C.*

Valuation of property.

We, J. P. Gray, and J. C. Akin, two disinterested housekeepers of Hickman County, and not being related to either of the parties, being this day called upon by W. M. Samuels, sheriff of Hickman County, to appraise and value the following property, to wit, the right, title, and interest of Isaac Shelby in lots No. 245 and 246 in the plan of Columbus, Ky.; also his right, title, and interest in two lots known on original in same as the u'per half of No. 43 and all of No. 47 (the first 50 feet front by 200 deep); also on lots 180 and 187, as known on the plan of Kentucky City, all of which was conveyed by E. H. Taylor & wife to Isaac Shelby, about to be sold by said sheriff as the prop-
248 erty of Isaac Shelby to satisfy an execution that issued from the office of the Fayette circuit court on the 29th day of November, 1866, No. 358, in favor of Waller Chenault, Noah H. McClelland, John Burnsides, and J. B. Dunn, against Edward H. Taylor, jr., Isaac Shelby, J. Warren Grigsby, and William Shouse, upon our oath do value the said lot No. 245 at $30 per foot, No. 240 at $30 per foot, half of No. 43 at $20 per foot, No. 47 at $20 per foot, No. 180 at $20 per foot, No. 187 at the sum of two dollars per foot.

JNO. P. GRAY.
J. C. AKIN.

Sworn to before me by J. P. Gray and J. C. Akin this seventh day of January, 1867.

W. M. SAMUELS, *S. H. C.*

By virtue of the within execution I did, on Monday, the seventh day of January, 1867, that being county court day, after first having duly advertised the time, place and terms of sale according to law, and having the property appraised by two disinterested and intelligent housekeepers of Hickman County not related to either of the parties, to wit, J. C. Akin and John P. Gray, offer half of lot No. 43 to the highest bidder, on a credit of three months, at the court-house door in the town of Clinton, Ky., and Victor Vandernale bid the sum of two
249 hundred dollars, and no one offering more, the same was publicly stricken off to said Vandernale, who executed bond with A. G. Sims, surety: bond herewith returned. I there offered seperately lots No. 47, 245, 246, 180 & 187, and Bullock and Chinn, by John Chinn, agent and att'y for plaintiffs, bid seperately for each of said lots the sum of $5, and no one offering any more for either of said lots, they were seperately stricken off to said Chinn, agent and attorney for plaintiff, at the sum of $5 each, making $25; as the purchase was for plaintiff, no bond is taken, which, after deducting my commission, $13.50, entitles this execution to a credit of $211.50, Jan. 7, 1867.

W. M. SAMUELS, *S. H. C.*

We, Victor Vandernale, principal, and A. G. Sims, security, do bind ourselves to pay Waller Chenault, Noah H. McClelland, John Burnsides, and J. B. Dunn, within three months from the date hereof, the sum of two hundred dollars with interest thereon from this date, being the purchase money for two upper half of lot No. 43, in the town of Columbus, Ky., which was this day sold by W. M. Samuels, sheriff of Hickman County, in satisfaction of an execution which issued
250 from the office of the clerk of the Fayette circuit court on the 29th day of Nov., 1866, in favor of the said Waller Chenault, &c., against Edmund H. Taylor, jr., Isaac Shelby, J. Warren Grigsby, and William Shause, for the sum of five thousand one hundred and forty-nine dollars debt, with interest and costs.

Given under our hands this 7th day of January, 1867.

VICTOR VANDERNALE.
A. G. SIMS.

Attest:
W. M. SAMUELS, *S. H. C.*

THE COMMONWEALTH OF KENTUCKY, *sct.*:

To the sheriff of Hickman County, greeting:

You are hereby commanded that of the estate of Edmund H. Taylor, jr., Isaac Shelby, J. Warren Grigsby, and William Shause, late of your bailiwick, you cause to be made the sum of five thousand one hundred and forty-nine dollars in damages, with interest thereon at the rate of six per cent. per annum, from the 17th day of August, 1858, until paid, which Waller Chenault, Noah H. McClelland, John Burnsides, and J. B. Dunn, late in our Fayette circuit court recovered against them; also $14.25, which to the said Waller Chenault, &c., in our said court, was adjudged for their costs by them about their suit in this behalf expended,
whereof the said Taylor, Shelby &c., are convict, as appears to
251 us of record, and that you have the same before the judge of our said court at the court-house, in Lexington, on the 4th Monday in May next, to satisfy and pay the said debt, interest, and costs aforesaid, and have there then this writ.

Witness, John B. Norton, clerk of our said court, at the court-house

aforesaid, this 11th day of April, 1867, and in the 75 year of the commonwealth.

JOHN B. NORTON, *C. F. C. C.*

(Endorsed as follows:)

Credit within by $211.50 made by sale on former execution Jan'y 7, 1867.

Att.:

CHAS. T. LOURY, *D. C. F. C. C.*

Levied, May 20, 1867, on Isaac Shelby's right of redemption in lots No. 245 and 246, also on the upper half of 43 and all *of* in the town of Columbus, K'y, also on 180 and 187 on the plan of Kentucky City, as the property of said Shelby.

A. S. ARNOLD, *S. H. C.*

The commonwealth of Kentucky, to the sheriff of Hickman County, greeting:

We command you that you expose to sale that estate of Isaac Shelby, consisting of his right of redemption in lots Nos. 245 & 246,
252 also on the upper half of 43 and all of 47 in the town of Columbus, K'y, also on No. 180 & 187, on the plan of Kentucky City which, according to our command you have taken into your hands, and which remains in your hands unsold, as you have certified to the judge of our Fayette circuit court, to satisfy and pay Waller Chenault, Noah H. McClelland, John Burnsides, and J. B. Dunn the sum of five thousand one hundred and forty-nine dollars in damages, with interest thereon at the rate of six per cent. per annum from the 17th day of August, 1858, until paid, whereof in our said court they recovered execution against the said Isaac Shelby & others by virtue of a judgment in said court. Also $14.85 which to the said Waller Chenault & others in our said court was adjudged for their costs by them about their suit in this behalf expended, whereof the said Edmund H. Taylor, jr., Isaac Shelby, J. Warren Grigsby, & William Shause are convict, as appears to us of record, and that you have the same before the judge of our said court at the court-house, in Lexington, on the 4th Monday in July next, to satisfy and pay the said debt, interest, and costs aforesaid, and have there then this writ.

Witness, J. B. Morton, clerk of said court, this 27th day of May, 1867.

JOHN B. MORTON, *C. F. C. C.*

253 (Endorsed as follows:)

Credit within by $211.50 made by sale on former execution Jan'y 7th, 1867.

Att.:

JOHN B. MORTON, *C. F. C. C.*

By virtue this venditiona exponas, I did on Monday, the 1st day of July, 1867, that being county-court day, at the court-house door in the town of Clinton, Ky., after first having duly advertised the time, place, and terms of sale according to law, offer Isaac Shelby's right of redemption to the property levied on to the highest bidder, on a credit of three months, and E. J. Bullock, agent and att'y for plaintiff, bid the sum of fifty dollars for lot No. 245, fifty dollars for No. 246, three hundred dollars for No. 47, fifty dollars for No. 180, and fifty dollars for No. 187, and for the right of redemption in lot 43 fifty dollars, and no one

offering any more for either of said lots, they were seperately stricken off to said E. J. Bullock, agent and att'y for plaintiff, as set forth above, making in all five hundred and fifty dollars ($550), which, after deducting my commission, $25.50, entitles this execution to a credit of $527.50, July 1st, 1867.

A. S. ARNOLD, *S. H. C.*

STATE OF KENTUCKY, *set:*

Fayette circuit court.

254 I, J. B. Rodes, clerk of the court for the circuit aforesaid, do certify that the foregoing twenty-three pages contain a full, true, and complete copy of the record & proceedings had in the case mentioned in the caption.

Witness my hand as clerk this 23rd day of January, 1873.

Att.:

J. B. RODES, *C. F. C. C.*

The counter state of facts on the claim is as follows:

Counter statement of facts on claim of W. H. Thomas.

C. W. PURCELL & OTHERS
vs.
J. WARREN GRIGSBY & OTHERS.

Counter state of facts.

The complainant, C. W. Purcell and others, for counter statement to the state of facts presented before James A. Beattie, esqr., master, by W. H. Thomas, a claimant, say that it is not true that the debt upon which the judgment of McClelland, Chenault & Co., filed with said statement, was obtained was created since the 14th day of July, 1857.

They deny that said Thomas has a debt provable under the decree herein, and pray that the same may be excluded.

W. O. HARRIS,
Sol'r for Complainant.

The state of facts of Shause's heirs referred to in the master's
255 report is as follows:

Statement facts on claim of Shouse's heirs.

Circuit court of the U. S., district of Kentucky.

PURCELL, &C, COMPL'TS,
vs.
GRIGSBY, &C., DEF'TS. } In equity.

The affiants, Virginia Wilson, Samuel Ayres, Albert J. Shause, Nannie L. Shause, an infant, by John K. Goodloe, guardian, and John Shause say that the following claims are due them by the def't Grigsby, and are secured under the deed of trust herein, to wit: Virginia Wilson, $800; Samuel Ayres, $1,000; John K. Goodloe, $566.66; Albert

J. Shause, $266.66; Nannie L. Shause, $266.66; E. E. Shause, $800; and John Shause, $200, all with interest from Jan'y 17th, 1873. Said claims and each of them arose as follows: William Shause was one of the partners in the firm of Taylor, Shelby & Co., doing business in Lexington, Ky., as bankers. While said firm was in existence it was composed of E. H. Taylor, jr., Isaac Shelby, and William Shause.

On the 11th of July, 1857, this firm was dissolved, W'm Shause
256 retiring, and on the 14th July, 1857, J. Warren Grigsby, who is the grantor in the deed of trust on file herein, with said Taylor & Shelby formed a new firm which took the same name, Taylor, Shelby & Co., and continued to do the same business at the same place. When said Shause retired from said firm the other partners retained all of its assets and assumed all of its indebtedness.

On the 17th of August, 1858, Waller Chenault, Noah H. McClelland, John Burnsides, and J. B. Dunn recovered a judgment in the Fayette County, Kentucky, circuit court against W'm Shause, E. H. Taylor, jr, Isaac Shelby, and J. Warren Grigsby, in the sum of $5,149 and costs.

The cause of action upon which this judgment was recovered was a certain deposit of money alleged to have been made by the plaintiffs in said suit, who were partners under the name of McClelland, Chenault & Co., with the first firm of Taylor, Shelby & Co., and which deposit continued with said new firm of Taylor, Shelby & Co., and was to their credit in said new firm. The said new firm of Taylor, Shelby & Co. assumed to pay the money due to said McClelland, Chenault & Co., and the
257 same became and was the debt of said new firm, the consideration thereof being the retaining by said new firm of all the assets of the old firm.

W'm Shouse died leaving a will, wherein he bequeathed certain legacies to persons therein named or described. John Shause having qualified as the executor of the decedent, under the directions of said will paid to the legatees certain sums of money, among others, to Virginia Wilson, $2,000; Amanda Hawkins, $2,000; Mildred Ayres, $2,000; J. Albert Shause, $750; Nannie Shause, $750; Mary Goodloe, $750.

On the 15th Nov., 1871, the owners of said judgment hereinbefore referred to instituted suit in the Louisville chancery court against the affiants and the above-named legatees and others, to obtain satisfaction of said judgment, and on the 6th January, 1873, judgment was rendered on said claim against Virginia Wilson for $800, Amanda Hawkins, $800; Samuel Ayres, who is the husband of Mildred Ayres, $800; John K. Goodloe, who is the husband of Mary Goodloe, Nannie L. Shause, and Albert J. Shause, $800; and E. E. Shause, $800.

258 All of these persons against whom judgment was rendered have paid the same, except Amanda Hawkins. Of the amount adjudged against her one-fourth has been assigned to John Shouse, one fourth to Samuel Ayres, and one-half to John K. Goodloe, said persons having paid the pl'ffs in the proportions stated in full for said judgment.

The said judgment of McClelland, Chenault & Co. was one of the debts referred to in the fourth claim of said deed of trust, and is secured by it; and said Grigsby and the funds arising from *from* the sale of said trust property are bound in law to indemnify the affiants for the money so paid by them as aforesaid. A duly certified copy of the proceedings in the Fayette circuit court and the judgment in the Louisville chancery court are filed herewith as part hereof, marked "A."

The counter state of facts on the claim of Shause's heirs is as follows:

Counter statement of facts on claim of Shause's heirs.

C. W. PURCELL, &c.,
vs.
J. WARREN GRIGSBY, &c.

The complainants, for a counter state of facts to the claim
259 of the heirs of William Shause, heretofore filed with the master, James A. Beattie, esqr., say:

That it is not that the deposit of money with Taylor, Shelby & Co., mentioned in said state of facts, claim, or affidavit, continued with the new firm of Taylor, Shelby & Co., or was to the credit of said new firm after the 14th day of July, 1857. That it is not true that when William Shouse retired from said firm the remaining partners retained all of its assets and assumed to pay all of its debts.

That it is not true that, as between himself and William Shause, J. Warren Grigsby ever became a member of the firm of Taylor, Shelby & Co.

That it is not true that the debt sought to be proven by said claimants was created since the 14th day of July, 1857.

They deny that said complainants have a debt payable under the deed herein, and they pray that the same be disallowed.

W. O. HARRIS,
Sol. for Complainants.

The first deposition of Edmund H. Taylor, j'r, referred to in the master's report, is as follows:

Int. 1. Were you or not a partner of the former firm of Taylor,
260 Shelby & Co. which was engaged in the business of banking in Lexington, Kentucky, in the year 1857?

Ans. I was a partner as indicated in the interrogatory.

Int. 2. Please state whether or not you ever made any arrangement or arrangements by paying, securing, confessing judgment, or otherwise, with complainant Purcell, or any other person or persons, in regard to the debt evidenced by three bills of exchange, dated Sept. 5th, 1857, drawn by Taylor, Shelby & Co., on the Shoe and Leather Bank of New York in favor of Theodore Johnston; one for ($7,650.04) seven thousand six hundred and fifty $\frac{04}{100}$ dollars payable on the 29th of September after date; one for ($8,456.90) eight thousand four hundred & fifty-six $\frac{90}{100}$ dollars, payable on the 6th of October after date and the other for ($7,000) seven thousand dollars, payable on the 14th of October after date. If so, give a full statement of all such arrangements, showing with whom they were made, what interest the parties had in the debts at the time they were made, and when they were made.

Ans. I made no arrangements with Purcell and others in regard to the debt evidenced by three bills of exchange recited, dated, according to my books, Sept. 4th, 1857. The bill of $7,650.04 I paid to Theodore Johnston, endorser on same, he assuming to take up and return
261 the said bill to Taylor, Shelby & Co. I also confessed judgment in Fayette circuit court, and gave to the attorney of C. W. Purcell & others, G. B. Kinkead, sundry collateral securities.

Int. 3. If you ever gave to any collaterals or other security for said debts, please give a list of such collaterals and securities, and say to

whom and when they were given, and whether or not, to your knowledge, they have ever been accounted for or credited on the debts.

Ans. As stated in answer to question 2, I gave to the attorney of plaintiffs a note of J. W. & J. C. Cochran, which appears credited on the judgment; to C. W. Purcell, $7,500, also credited, and a note or acceptance of Millehen and Gamble, of New York city, to amount of $5,000, I think, which is not credited; also, in 1860, to G. B. Kinkead, for plaintiffs, a note of Sam'l J. Walker, $1,850, which he still held in fall of 1863, but which is not credited.

Int. 4. Please state whether or not your statements in answer to the above interrogatories have been given after refreshing your memory by examining the books of the firm?

Ans. My statements are made after refreshing my recollection by examination of books and otherwise.

Int. 5. Did you ever make to any one any tender of money or
262 currency in payment of said debts? If so, say to whom you have made it, whether or not the party to whom it was made was authorized to collect the debts, and whether accepted or declined to accept the tender. Please give a full history of this matter.

Ans. I tendered to G. B. Kinkhead, plaintiffs atto., notes of the Farmers' Bank of Virginia to an amount I conceived to be in full of am't due the plaintiffs. Said atto. was authorized to collect the debts. He neither accepted or refused positively the tender, but conferred with Mr. W. H. McFarland, pres't of Farmers' Bank of Virginia, one of the plaintiffs, whom I afterward understood from the atto. declined it. This was, I think, in fall of 1861, and I paid for said notes 95 c. in U. S. Treasury notes.

Int. 6. Please say for what debt the judgment was confessed by E. H. Taylor & Co., and Isaac Shelby, in the Fayette circuit court, in favor of C. W. Purcell & Co., for $15,456.97, with interest from Sept. 21st, 1857, and seven thousand six hundred & fifty $\frac{55}{100}$ dollars, with interest from Oct. 1st, 1857, and $6.25 in bills of exchange not paid.

Ans. The judgment was confessed for bills of exchange recited in my answer No. 2.

1st X-int. If you say that you were a member of the firm of Taylor, Shelby & Co., state whether you were the managing partner,
263 and whether the books and papers of the firm are now in your possession.

Ans. I was managing partner in the firm of Taylor, Shelby & Co., and the books and papers not mislaid since the suspension of s'd firm are in my possession.

2d X-int. If you state on the examination in chief that you ever made any payment upon the debt evidenced by the bills of exchange described in interrogatory 2nd, state the date and amount of such payment, and to what person it was made.

Ans. This is answered in my answer No. 3 in the examination in chief as nearly as I can answer it.

3 X int. If you say on the examination in chief that you ever secured the debt evidenced by the bills of exchange described in *in* interrogatory 2d, or any part thereof, by any collaterals, state when and to what person such collaterals were transferred, and describe the same minutely, giving the name of the debtor bound thereon, and his place of residence at the time of the transfer, and now, if living.

Ans. This is also answered as accurately as I can in my answer to question No. 3 in examination in chief.

4 X-int. If you say that any payments were ever made upon, or

264 any collaterals transferred to secure the bills of exchange hereinbefore referred to, state whether any receipt was ever taken for the same, or whether there is any manner of written evidence thereof; and if so, file the same with your answer to this question.

Ans. I am unable to find any written evidence on my papers, or receipt for the collaterals transferred plaintiffs or their attorneys.

5' X-int. If you state on the examination in chief that you confessed a judgment on the bills of exchange described in interrogatory 2d, state whether the judgment referred to is the same as that of which a copy accompanies these cross-interrogatories.

Ans. The judgment confessed was on bills referred to in my answer No. 2 in examination in chief.

6th X int. State whether any member of the firm of C. W. Purcell & Co., or any officer of the Farmers' Bank of Virginia, or any agent of said firm or of said bank was in Lexington at the time of the confession of judgment; and if so, give the name of such person and the name of the person representing the plaintiffs in said judgment at the time it was confessed.

Ans. My recollection is that G. B. Kinkead, of Lexington, represented the plaintiffs at the time of the confession of judgment, and that neither Purcell or any officer of the Farmers' Bank of Virginia was present.

265 7th. X int. Examine the credits appearing in said judgment, to wit: $2,156.10, paid Feb'y 20th, 1859, and $7,500.00 paid March 13th, 1860, and state who made said payments, in what manner they were made, whether in money or otherwise, and to what person they were made.

Ans. The $2,156.10, appearing as credit in the judgment, was made by collection of a note of J. W. and J. C. Cochrane, which I gave to plaintiffs' attorney, and $7,500 from a sale of real estate made by me to C. W. Purcell, the said real estate lying in the city of Chicago.

8th int. If you state in answer to interrogatory 5 that you ever made any tender of the debt evidenced by the bills of exchange described in interrogatory 2, state accurately the sum tendered, the date of the tender, the currency or money in which it was made.

Ans. I do not recollect the amount tendered plaintiffs' attorney, nor can I after investigation ascertain it. The date of the tender I believe to have been in the fall of 1864. My answer to interrogatory No. 5 in examination in chief answer. fully. I produced the notes of Farmers' Bank of V'a, and tendered same to plaintiffs' atto', and at his request placed same in B'r B'k of Lexington, where I believed it remained until declined by the Farmers'.

266 9' X-int. State whether your answers to these interrogatories, or cross-interrogatories, or to any of them, have been made from memory alone, or whether you have refreshed your memory either at the time of giving your deposition, or before, by reference to any book or paper of any kind: if so, describe said book or paper, and if a paper, file the same with your deposition.

Ans. My answers are made partly from information had from my books, partly from memory. I have found no papers throwing any light on the case. Answered all the interrogatories propounded to him. States as cause for delay in giving his deposition the following facts, viz: that the cause of sickness and a desire to give accurate information, which necessitated a trip to Lexington, he was unable sooner to depose in the case.

EDMD. H. TAYLOR, Jr.

I, D. W. Lindsey, U. S. commissioner for the district of Kentucky, do certify that the foregoing depositions of Edmund H. Taylor, jr., was taken before me upon the interrogatories and cross-interrogatories hereto attached, and under the written consent appended to the interrogatories, and was read to and subscribed by him in my presence, at the time and place and in the action mentioned in the caption, the said Taylor having been first sworn by me that the evidence he should give in the
267 action should be the truth, the whole truth, and nothing but the truth, and his statements reduced to writing by him in my presence, neither plaintiff or defendant in person, or by attorney, nor any other person being present at the examination: that I am not counsel or attorney for either of the parties, or interested in the event of the cause.

Given under my hand this October the 21st, 1872.

D. W. LINDSEY.
U. S. Commissioner, K'y Dst.

Examined by F. T. Fox, esquire, counsel for defendant, J. Warren Grigsby.

Question 1st. State whether Taylor, Shelby & Co. ever gave to complainants C. W. Purcel & Co. a bill of exchange, dated August 4th, 1875, at New York, payable on the 15th day of October thereafter, and drawn by W'm F. Roelosson, and if so, give the amount, upon whom it was drawn, and for what purpose it was given to complainants.

Ans. Taylor, Shelby & Co.'s books show that an acceptance of George M. Sanders, drawn by W'm T. Roelosson for $5,107.40, dated at New York, the 4th of August, 1857, and payable on the 15th of October, 1857, at the Bank of the State of New York in New York City,
268 endorsed by Taylor, Shelby & Co., Isaac Shelby, and myself, was given to the complainants C. W. Purcel & Co., as collateral security to sundry protested drafts of Taylor, Shelby & Co., which were held by the complainants.

Quest. 2. State what amount the complainants, Purcell & Co., realized from this and other collaterals placed in their hands by Taylor, Shelby & Co.

Ans. I am unable to answer this question. I cannot state what amount they so realized.

Quest. 3. Was this Sanders acceptance considered good at the time it was given as a collateral to complainants?

Ans. I so considered it.

Quest. 4. State if you know why nothing was realized therefrom.

Ans. I don't know whether anything was ever realized from it or not, and if nothing, I don't know why.

Quest. 5. Did you ever receive any communications from complainants stating what use they had made of these collaterals, or what they had realized from them, either in payment from the acceptor or by pledging them to other parties in payment of their own debts.

Ans. I suppose I did hear from the complainants what disposition had been made of the collaterals, but such a length of time has now
269 elapsed that I have no recollection in regard to the matter at all. My memoranda only shows the papers which were put as collaterals into the hands of complainants, but do not show what disposition was made of them, except that my books show that $7,500.00 were credited on the 13th day of March, 1860, and $2,156.10 on the 20th day of February, 1859, on the claim of complainants against Taylor, Shelby & Co. By my books I mean Taylor, Shelby & Co.'s books.

Quest. 6. Please state whether or not you or the firm of which you

were than a member ever made any arrangement or arrangements, by paying securities, confessing judgments, or otherwise, with complainants, Purcell & Co., or any other person or persons, in regard to the debt evidenced by three bills of exchange dated Sept. 5th, 1857, drawn by Taylor Shelby & Co. on the Shoe and Leather Bank of New York, in favor of Theodore Johnston, one for $7,659.04 (seven thousand, six hundred & fifty $\frac{04}{100}$ dollars, payable on the 29th of September after-date; one for $8,456.90 (eight thousand, four hundred and fifty-six $\frac{90}{100}$ dollars), payable on the 6th of October after date; and the other for $7,000 (seven thousand dollars), payable on the 14th of October after date. If so, give a full statement of all such arrangements, showing with whom they were made, what interest the parties had in the debts at the time they were made, and when they were made.

270 Ans. I have explained this matter in full in my deposition heretofore given in this cause; and I now refer to my said explanation and make the same part of this answer.

Quest. 7. Please read said deposition heretofore given by you for the defendant, J. W. Grigsby herein, before D. W. Lindsey, United States commissioner at Frankfort, Ky, on the 21st day of October, 1872. State whether the answers therein made are true; and adopt and make the said deposition part of your present deposition.

Ans. I have read said deposition. The answers therein contained are all true and I now reaffirm all the statements therein made, and I adopt the said deposition as my deposition, and make the same, marked "A" part of my present deposition.

Quest. 8. State if you can remember any other collaterals given by you or your firm to complainants or their attorney or agent, in consideration of the premises. If so, give the name of the attorney, and the value of those collaterals at that time, and show you know it.

Answer. I wish to correct or add to one of my answers above. I find since yesterday that the Sanders acceptance, above named, was given to the complainants as a collateral, as I have stated above,

271 but that it was afterwards returned by them to me, and other collaterals given by me to complainants, as follows: I gave to the attorney of complainants a note of J. W. & J. C. Cochrane, which appears credited on the judgment to C. W. Purcell, $7,500, also credited; and a note or acceptance of Millikin and Gamble, of New York City, to amount of $5,000.00, I think, which is not credited; also in 1860, to G. B. Kinkead, attorney for complainants, a note of Sam. J. Walker, for $4,580.00 instead of $4,850.00 as stated in my former deposition in this cause, which he still held in the fall of 1863, but which is not credited. I also transferred to Richard Pindle, a quarter of a share in the town of Superior, Wisconsin, to be applied to the indebtedness of Taylor, Shelby & Co. Some little time prior to that transfer, the sales in that town showed the value of said quarter share to be about $12,000.00 or $15,000.00.

Quest. 9. State what conversation, if any, you ever had with complainants about the Millikin and Gamble paper, and what disposition was made, if any, of said paper.

Ans. I met M'r Purcell and M'r McFarland both at the office of Millikin & Gamble, in New York, for the purpose of endeavoring to effect some settlement with Millikin & Gamble, of the demand

272 against them. We were there several days. M'r B. J. Adams, of Louisville, since deceased, accompanied me for the purpose of aiding me in making the settlement. When I left New York I understood, and I think that Mess' Purcell and McFarland understood that

they would be able to collect the Millikin and Gamble debt, but the lapse of time has been so great that I cannot now remember the particulars of the conversations which took place between the parties interested on the occasion referred to.

Quest. 10. State when the Superior claim collateral and the Millikin & Gamble debt were placed in the hands of complainants or the attorney of complainants and what information you have since received from complainants or either of them, or their attorney, as to the disposition made of both said collateral by complainants or either of them, or by their attorney for them.

Ans. I am not able to fix the date, either by day, month, or year. I can only say that it was before the late civil war in this country. Nor can I state that the Superior collateral was placed in the hands
273 of Mr. Pindle, as attorney for complainants. All I know about that is, that it was placed in his hands to be applied to liquidating the indebtedness of Taylor, Shelby & Co. I know nothing further than I have already stated as to the disposition made of them.

Cross-examined by W. O. Harris, esquire, counsel for complainants.

X-quest. 1. State whether the Millikin and Gamble paper, of which you speak, is the same mentioned in a paper now filed and made part of this question, marked A, and whether the signature of "Taylor, Shelby & Co." to said paper now filed was made by you. Make said paper a part of your deposition.

Ans. I have examined the paper referred to, marked A, and now make the same part of my deposition. I suppose the paper therein referred to to be the Milliken & Gamble paper, about which I have been testifying. The signature to said paper (A) is the genuine signature of Taylor, Shelby & Co., made by myself.

X-quest. 2. When was the Walker paper *paper*, of which you have spoken, given to Mr. Kinkead? Give the exact date.

Ans. I am not able to give the date at all. I only know the
274 fact that that paper was in M'r Kinkead's hands at the time I state.

X-quest. 3. Did you place it in his hands yourself?

Ans. That is my recollection, that I turned it over, either to M'r Kinkead or the complainants themselves, who may have placed it in his hands.

X-quest. 4. Are your statements, in regard to this paper, made entirely from your own memory?

Ans. They are made from my own memory, and the statements of M'r Kinkead that the paper was in his hands at the time I have named.

X-quest. 5. Is there anything in Taylor, Shelby & Co.'s books referring to this paper?

Ans. There is nothing referring to the transfer of it, so far as I was able to find. Those books were not kept up for several years prior to the time of the transfer of the paper. H. Walker owing Taylor, Shelby & Co. a good deal of money, and the notes evidencing the indebtedness were frequently changed or renewed.

X-ques. 6. How did Walker happen to owe Taylor, Shelby & Co.? Describe the transactions out of which the giving of the paper, about which you have been testifying, arose.

Ans. I could not tell you now, after this lapse of time, what the transactions were out of which this particular paper arose. He was very largely indebted to us at the time of our suspension. I think he was then owing us about $100,000$^{00}_{100}$; and, as I have stated, his paper

275 to us was frequently changed. I cannot state how this particular piece of paper came to be just for $4,580.00.

X-quest. 7. Did he ever pay the $100,000.00, or the $4,580.00?

Ans. A large part of the indebtedness to the firm, or all of it, so far as I know, has been paid or arranged, except this piece for $4,580.00, which I have lost sight of since the transfer; and I don't know whether Walker has paid it or not. There may also be other portions of the indebtedness unliquidated, but not to my knowledge.

X-quest. 8. How and when was the $100,000.00 paid by Walker?

Ans. I would not be able to state when the indebtedness was transferred to Taylor, Shelby & Co.'s creditors. The indebtedness was cut up into parcels to correspond with debts of Taylor, Shelby & Co.'s, and transferred to the creditors holding such debts. The paper was extended from time to time. Portions of the debt have been paid to the Farmers' Bank of Kentucky, within the last year or two, and that bank may hold some of the paper yet. I never doubted either Walker's honesty or his ability, and always thought he would pay.

X quest. 9. How do you know Kinkead was attorney for the
276 now complainants in this case, or how long he continued as such attorney?

Ans. I know by the representation of the complainants, and also by Mr. Kinkead's representations to me; but I cannot state when the representations were made. I don't remember to have seen M'r Purcell or M'r McFarland after August, 1860. I think I continued a correspondence with M'r Kinkead, as attorney for the complainants, up to 1866 or 1867.

X-quest. 10. Was this Walker paper given to Kinkead before or after the confession of judgment?

Ans. I suppose it was given after the confession of judgment; but this is mere supposition; I have no recollection on the subject.

X-quest. 11. Was the share in Superior City, spoken of in answer to question 8, transferred to Pindell by deed?

Ans. I don't know in what shape those shares were. My recollection is that it was a bond for title from Spencer C. Benham, as attorney in fact of Douglas and others, or it may have been from Edmund Rice.

X-quest. 12. Were you one of the parties who confessed the judgment in favor of complainants?

Ans. I think I was. M'r Shelby and myself confessed the judgment.

EDMUND H. TAYLOR, J'R.

277 The deposition of Susan P. Grigsby, referred to in the master's report, is as follows:

Examined by W. O. Harris, esquire, counsel for complainants.

Quest. 1. What property did you own at the time of your marriage?

Ans. I owned, at the time of my marriage, twelve hundred and thirty-seven or thirty-nine acres of land, by recent survey, situate in Lincoln County, Kentucky; about fifty-nine or sixty negroes, besides several others I received two or three years after my marriage; there was also a great deal of stock on the place; and also ten or twelve thousand dollars in money, I suppose, although I cannot fix the exact amount.

Quest. 2. Do you still own the land?

Ans. Yes, sir; I do.

Ans. The 5th day of November, 1850.

Quest. 4. Have you acquired any property since that time?

Ans. Yes; the division of my father's estate was not completed at the time. There was a subsequent division, some five or six years after my

marriage, on the death of my mother. The 1237 or 1239 acres I have mentioned above were absolutely mine at the time of my marriage, but I did not come into the possession of 190 acres of the same until
278 some five or six years afterwards. Some negroes and money were allotted to me after the death of my mother, and also an interest in some real estate, town property in Danville, Kentucky; but the real estate was subject to a life interest in behalf of my step-father, D'r Robert J. Breckenridge, who died about a year ago. My mother has been dead about 14 years.

Quest. 5. What property did your husband have at the time of your marriage?

Ans. He owned a place, a farm near Lexington, Virginia, and twenty-seven or thirty , if I remember correctly.

Quest. 6. Has he acquired any property since then? If so, state what property, as nearly as you can.

Answer. Well, he acquired, in 1856 and 1857, a large amount of property in the West, realized by the investment of his own means and my own.

Quest. 7. Does he own any property now?

Ans. The fact is now recalled to my memory that M'r Grigsby told me, several years ago, that he had conveyed this property to a trustee. He owns no other property that I know of.

Quest. 8. What has been his occupation since your marriage?

Ans. Engaged generally in superintending his and my property and in dealing in real estate for some years.

279 Quest. 9. When was the acceptance for $5,000 which was held by the Agricultural Deposit Bank of Lexington paid; the one referred to in your affidavit?

Ans. I paid that immediately after the close of the war; it amounted to upwards of $6,000.00 then with the interest.

Quest. 10. Give as nearly as possible the exact amount that payment and by whom it was made.

Ans. I think it was $6,000.00 or a little upwards. I had previously taken up the original paper with my own paper, thereby releasing Col. Hart and M'r Shelby, the endorsers. I had promised to pay the debt, having carried on a correspondence with M'r James, who owned the debt, in regard to it, and after M'r Grigsby's return M'r James wrote to him in regard to the debt and it was then paid with my means. It is my recollection that two payments were made on that debt; that first the interest was paid, perhaps, and afterwards the payment of $6,000.00 or upwards was made just after the war.

Quest. 11. When and by whom was the acceptance which was held by the branch of the Commercial Bank of Kentucky, at Harrodsburg, paid? State also what amount was paid.

Ans. That was paid, I think, in the winter of 1863'-4. I think it was $3,000.00 that was paid.

280 Quest. 12. Why did you pay this debt?

Ans. There were several respectable parties who notified me through my friends that M'r Grigsby was their debtor, and they asked me to pay them their debts, which I promised to do if they would give me time. This Commercial Bank debt was one of those debts I think. I paid a number of such debts.

Quest. 13. What amount of money was paid to George H. McKinney, administrator of Huston?

Ans. I cannot recollect the amount of this payment without looking

at the receipt to refresh my memory. The receipt on file shows the correct amounts.

Quest. 14. Were the receipts which have been filed with your affidavit in this case taken at the same time the debts were paid?

Ans. I think they must have been. Yes. Some of those debts were paid by agents of mine, and they would of course take receipts for all payments made by them, and did do it, I am very sure.

Quest. 15. What was the nature and consideration of the debt mentioned in your affidavit as having been due to Thomas H. Shelby as your trustee?

Ans. That arose out of the sale of some slaves held in trust for me by my uncle, Thomas H. Shelby, as all of my property was held. M'r Grigsby sold the slaves with the consent of my trustee and my-
281 self. They were sold into Woodford County, where the slaves desired to go. I suppose that M'r Grigsby received the proceeds of sale for my benefit.

Quest. 16. Your claim in this case is credited by $5,000, less $250, attorney's fee. From what source was the money obtained?

Ans. I remember talking that over with M'r Grigsby at the time my affidavit was drawn up, but I can*not* now recollect nothing in regard to this matter, except I remember M'r Walker's name was mentioned.

Quest. 17. Did you ever receive any money or property out of the assets of Taylor, Shelby & Co.?

Ans. No, never to my certain knowledge; and I never expect to.

Quest. 18. How do you know that the miscellaneous payments referred to in your affidavit, and amounting in the aggregate to $3,500, were made? State if you know when and how these various sums were paid.

Ans. I paid a good many of these sums myself during the war, in sums of $200 and $300, $400 and $500, and $600 and $700. Since looking at the list, I find that it refers to other debts than I supposed. A great many of the debts named in the list were presented to and
282 paid by me during the war, and the others were paid after the war. I recognize all the names in the list.

Quest. 19. In what way did you keep your funds at the time these payments were made; did you have a bank account?

Ans. I had a bank account.

Quest. 20. In whose name was this account kept?

Ans. It was kept in my own name. I have kept no bank account since the war, or since the year 1866. I have attended to no business since the same period. M'r Grigsby has attended to my business since then, about which I have always known something. M'r Grigsby has generally talked over business matters with me, but I have no accurate recollection in regard to all my business transactions since 1866. M'r Grigsby has always been authorized by me in the most unlimited manner to use my means in the payment of his debts, so far as he might deem it right, necessary, or proper to do so.

Examined by F. T. Fox, esquire, counsel for M'r's Susan P. Grigsby:

Quest. 1. Did you or did you not take legal advice as to your rights in paying these debts previous to paying them?

Ans. I talked in regard to these matters several times with the
283 Hon. Joshua F. Bell, when I went to see him in reference to other legal affairs of mine in his hands. I talked to him on several occasions whilst I was engaged in paying off the debts, without my having gone to consult him specially in relation to them. He assured me

that I would be entitled to assert the debts against the property conveyed in trust by M'r Grigsby to pay them.

Quest. 2. Did you or did you not hear any assurance, understanding, or agreement that on paying these debts you would be entitled to be repaid, or be considered the owner of them and entitled to their transfer? If yea, state what it was.

Ans. I had that understanding with M'r Grigsby, and the debts were always paid by me on that understanding. After the war was over, a good many persons in our country in embarrassed circumstances took the benefit of the bankrupt law. M'r Grigsby was altogether averse to doing so, and I concurred with him in this. I told him to use everything I had to pay off his debts, if it everything I had, rather than to take the benefit of the bankrupt law, and also to endeavor to save his property in the West. Ever since our marriage I had
284 authorized M'r Grigsby to manage my business, and after the war I gave him the most unlimited authority to use my means in paying his debts, but always on the understanding and with the assurance that I was to be and would be reimbursed out of his property which he had conveyed in trust.

Re-examined:

Qu. 1. Were not many of those sums paid in his absence from the State and without his knowledge?

Ans. Of course they were, but he knew of those debts before he left, and desired me to have them paid out of the stock and produce of the place.

Qu. 2. Did you not pay these debts, or many of them, in order that your husband's creditors might not suffer by him, and in order that you might save his honor?

Ans. Yes, but with the confident expectation of being reimbursed.

SUSAN P. GRIGSBY.

The deposition of H. C. Pindell is as follows:

Examined by W. O. Harris, esquire, counsel for complainants:

Quest. 1. Do you know anything of a note of Sam'l J. Walker's,
285 referred to in the depositions of E. H. Taylor and Geo. B. Kinkead as having transferred to M'r Kinkead as a collateral security for the complainant's debt? If yes, state everything you know on the subject, and how much, if anything, was ever paid on it.

Answer. When I returned from Europe in the fall of 1869 I came home from New York by way of Chicago. While there, Judge S. M. Moore told me of some arrangement or promise of S. J. Walker to pay a note which he assumed to suppose belonged to me. Upon asking further explanation, he said my brother, R. Pindell, had sent him a note on Walker to collect, and instructed him to pay the money to me. I had no knowledge or information of the note, and so informed him. Some time afterward he reported a collection to me of $500, and remitted to me part of the amount. I wrote to my brother to know about it, and he wrote me to send it to him, and expressed surprise of its being remitted to me. When I went to Chicago in the following summer, my brother wrote to me to try and collect the remainder of the note. I had several interviews with Walker about it, which resulted in his giving me a check on Kinny, Espy & Co., Cincinnati, dated a month in advance, for $1,000. I collected this at maturity, and remitted it to my brother. A very short time after this my brother went to the Cleveland Water Cure, where he died in a short time. In looking up his affairs after his death, this

note occurred to me, and I wrote to Judge Moore for a copy of it, and received in reply a letter filed herewith as part hereof, marked "H. C. P." Soon afterwards I learned that Taylor, Shelby & Co. had delivered to complainants a note of Walker as collateral surety, and it occurred to me that this was, probably, the note. After seeing Taylor's deposition in this case, I became satisfied of it from the exact agreement of description. Judge Moore has informed me since the Chicago fire that the note was at that time destroyed.

H. C. PINDELL.

The exhibit marked "H. C. P.," referred to in the above deposition, is as follows:

CHICAGO, *Jan.* 31*st*, 1871.

H. C. PINDELL, esq., *Attorney at Law,*
Louisville, Ky.:

DEAR SIR: We have Walker's —— The note sv. him handed us by your bro' Rich'd for collection is in words and figures, to wit:

"$4,580.00.] COVINGTON, KY., *June* 21*st*, 1860.

"Twelve months after date I promise to pay to the order of Taylor, Shelby & Co. forty-five hundred and eighty dollars, payable at Covington Branch Northern Bank of Ky., value received, with interest from date.

"SAM'L J. WALKER.

(Endorsed:) "Taylor, Shelby & Co. Sept. 10th, 1869, c'r by cash five hundred $\frac{00}{100}$ dollars. M. & C." Also in figures without *cate*, thus: "$1,000. That was left in that way for you to tell was when Walker's dratt for that am't was p'd."

We are, yours, &c.,

MOORE & CAULFIELD.

The deposition of W. O. Harris, esq., is as follows:

Was informed some time last summer, in June, I think, by Mr. Pindell, of the facts he has stated in his deposition just given. I went to Chicago in July. Saw Judge Moore and Mr. Walker, and the latter acknowledged the debt and promised to pay it, subject only to the two credits of $1,000 and $500, which Mr. Pindell has mentioned. I have never collected anything upon it, and should have brought suit before this time but for the panic.

W. O. HARRIS.

Mr. Pindell asks me if it has not been my information that Walker is good. I have always considered him so until the panic. He was considered a wealthy man, but one who carried a heavy debt. Since the panic my letters from Chicago show that his condition is precarious.

W. O. HARRIS.

The deposition of J. Warren Grigsby, referred to in the master's report, is as follows:

1. In your answer filed in this cause on the 4th of December, 1871, you say "Respondent says that, for some time before the failure of said firm (meaning the firm of Taylor, Shelby & Co.), he, supposing that said firm was in a solvent and prosperous condition, was in negotiation

with it to become a member thereof, and arrangement of terms upon which, if complied with, he was to become a member at the future time had come to be pretty well understood between the parties, when William Shause, one of the members of the old firm, became, by reason of certain involvement with his son, embarrassed in his pecuniary circumstances, and the other members of the firm applied to respondent to permit himself to be announced as a partner in place of said Shause, to prevent injury to the business of the house growing out of the Shauses' embarrassment, but with the distinct understanding that respondent was not to become really a partner, nor in anywise interested in its business, except upon the terms of the old arrangement and after
289 they should be complied with. Respondent further says that, in pursuance of this arrangement, he permitted himself to be held out to the people of Lexington, the place at which its business was transacted, as a partner of said firm." Are the above-quoted statements true?

Ans. They are true in the sense in which they were used, as current narrative in the answer; but the fail to express the whole truth with accurate precission. For instance, in referring to the firm of Taylor, Shelby & Co., and afterwards speaking of negotiations with it looking to becoming a member thereof, I did not intend to imply that the negotiations were with all the individual partners, or that membership was to be with the then existing firm. The negotiations were with the resident business partners, Taylor & Shelby, exclusively, and I never had any negotiation or conversation or communication whatever with William Shause touching the matter. I had no acquaintance with him, and never for a moment entertained the idea of a partnership in which he was to be interested. The "arrangement of terms" referred to involved the winding up of the affairs of the old firm and the organization of the house on an entirely new basis, as more fully stated in my deposition.

290 Q. Were you not, at the time mentioned, advertised in the Lexington newspapers as a partner of the said firm?

Ans. I was never advertised as a partner of said firm after its dissolution. I was advertised as a partner of a new firm, composed of Taylor, Shelby & Grigsby, exclusively, under the same firm style of Taylor Shelby & Co., and which was in nowise responsible for the liabilities of Taylor, Shelby & Shause, the members of the old firm.

3rd. Did not McClelland, one of the members of the firm of McClelland, Chenault & Co., reside in Lexington, and the others in adjoining counties?

Ans. McClelland lives in Lexington, Chenault in Madison, and the other partners in Garrard County.

4th. Do you know anything, of your own knowledge, of how and when the debt of Taylor, Shelby & Co. to McClelland, Chenault & Co. was incurred? Is not your information on this subject derived wholly from others and from records and papers which you have seen?

Ans. I did not know how and when the debt was created, as it was one of Taylor, Shelby & Shause, existing before the formation of the new firm. I know that it was not a debt of the new firm. My information as to its being a debt of the old firm was derived from others, and the books, records, and papers which I have seen.

291 5. In your answer to interrogatory 6th in chief, you say "deponent says the pretended judgment purporting to have rendered by the Fayette circuit court in the case of McClelland, Chenault & Co. vs. Taylor, Shelby & Co. is fraudulent and void, and was obtained without

right as to him." Did you state fully in that answer the grounds on which you suppose that judgment to be fraudulent and void? If not, state them now; and if in doing so you state any facts, be particular in stating how you obtained the knowledge of those facts.

Ans. Not deeming it necessary, I did not state them in full in this; for instance, that plaintiffs in said action knew that the debt sued on was not the debt of Taylor, Shelby & Grigsby, and knew at the time they sued on it that it was the debt of Taylor, Shelby & Shause. This they state in their petition, and with this knowledge they took judgment against me in said case when I was bound neither in law or equity or morals for the payment of the same, all of which they well knew; and they now seek to take advantage of their own wrong and enforce against me a judgment thus obtained contrary to law and right.

J. WARRAN GRIGSBY.

The first deposition of J. Warren Grigsby, referred to in the master's report, is as follows:

292 Interrogatory first. Are you the J. Warren Grigsby who is a defendant to this cause?

Ans. I am.

Interrogatory second. State whether you were ever connected with the firm of Taylor, Shelby & Co., as a member or otherwise, and if yea, state the time and circumstances under which that connection commenced, how long it continued, and when it was terminated.

Ans. I was connected with the firm of Taylor, Shelby & Co. as follows, to wit: About the 14th day of July, 1857, Isaac Shelby came to the house of deponent in the county of Lincoln, distant some forty miles from the city of Lexington, and after informing him that the firm of Taylor, Shelby & Co., bankers in the city aforesaid, and consisting of E. H. Taylor, j'r, Isaac Shelby, & William Shause, had dissolved partnership before he left Lexington, William Shause retiring therefrom, asked permission of this deponent to use his name as a member of a new firm, to be composed of E. H. Taylor, j'r, Isaac Shelby, & deponent, for the transaction of a general banking business, under the firm
293 style of Taylor, Shelby & Co. Deponent consented to this proposition without being in anywise interested in the business or actually a partner in the firm, except as to strangers with whom new business might be transacted. He simply loaned his name to Taylor and Shelby to give credit to the concern with their parties in the transaction of new business. Deponent subsequently went to Lexington, when it was agreed between them that the business of Taylor, Shelby & Shause should be wound up as rapidly as possible, and the house be thereafter reorganized upon a basis submitted by deponent, who would then become a bona fide partner with full interest in the business. In pursuance of this agreement deponent went shortly afterwards to the State of Virginia to complete his moneyed arrangements, and before his return the house suspended payment, and after an unsuccessful attempt to arrange its business went into liquidation, and the proposed partnership was never entered into. At this interval of time and without access to the books or memoranda deponent cannot fix with certainty the day of suspension, but thinks it was early in October, 1857. Thereafter no business except in liquidation was transacted.

Interrogatory third. State whether you or any person author-
294 ized by you ever made any agreement with William Shause with relation to his retirement from the firm of Taylor, Shelby & Co., and particularly whether you ever promised to indemnify him against any

debt or debts which were owed by said firm at the time of his said retirement. State fully all the facts connected with said retirement.

Answer. I never made, in person, or otherwise, or authorized any one to make for me, any agreement with William Shause in relation to his retirement from the firm of Taylor, Shelby & Co.; I knew nothing of any such intention on his part, as we were at the time utter strangers to each other, and so continued up to his death; I never promised to indemnify against any debt or debts whatever; I never had any communication with him on any subject either before, during, or subsequent to my nominal connection with Taylor, Shelby & Co., and knew nothing of the facts connected with his retirement, except as stated in answer to interrogatory 2d.

Interrogatory fourth. If you state that you were at any time connected with the firm of Taylor, Shelby & Co., state also whether you, or any person authorized by you, promised or agreed in any manner to
295 become responsible for the debts of said firm created or existing at the time your said connection commenced. State also what was the financial condition of said firm at the time your said connection commenced.

Ans. I never promised or agreed in any manner to become responsible for the debts of Taylor, Shelby & Co. created or existing at the time my nominal connection with the firm commenced, nor did I ever authorize any one to make any such promise or agreement for me. Subsequent events demonstrated that the firm of Taylor, Shelby & Co. was insolvent when my said connection commenced, as very little new business was thereafter transacted and a large amount of my private funds were used in the subsequent liquidations, part of it going to the creditors of the old firm of Taylor, Shelby & Shause.

Interrogatory fifth. State, if you know, what was the nature of the demand upon which McClelland, Chenault & Co. obtained judgment against Taylor, Shelby & Co. for $5,145 in 1858, and when said demand originated.

Ans. The claim of McClelland, Chenault & Co. was for moneys deposited with Taylor, Shelby & Co. in the spring of 1857, whilst the firm was composed of Taylor, Shelby, and Shause, as the record in the case fully establishes.

296 Interrogatory sixth. State anything else you know material to this cause.

Ans. Deponent says the pretended judgment purporting to have been rendered by the Fayette circuit court in the case of McClelland, Chenault & Co. vs. Taylor, Shelby & Co. is fraudulent and void, and was obtained without right as to him; that his appearance therein was entered without his previous knowledge and consent or subsequent notification; that the answers of the defendants to said judgment, of whom it is pretended he is one, were drafted and executed, sworn to and filed, without his previous knowledge, consent, or authority or subsequent notification; that he had not then and never at any time authorized any one to draw, swear to, and file said answer in said cause, and that the same was filed before he was served with process in said action and within the jurisdiction of said court rendering or purporting to render said pretended judgment, and that said answer is not now and never was his act and deed. Deponent further says that on the day of , 1872, the plaintiffs in said judgment, or their assignee,
297 obtained a judgment in the Louisville chancery court, case No. 24869, against the heirs and distributees of William Shause, for the whole amount remaining due and unpaid on said Fayette judgment,

and then and there by an agreed judgment entered in the case cited did release the estate of William Shause from all liability under or by reason of said Fayette judgment, which release fully satisfied and discharged said judgment as to this deponent, who has never been alleged to have been a partner of William Shause, and if bound at all must have been so bound as constructive surety for lien on said claim.

Cross-interrogatory on behalf of Thomas:

If you state any contract with Shause state specifically all of its terms, whether it was in writing or by parol, when and where it was made, and who was present when it was made; whether it was entered into by you and Shause in person, or if either or both of you acted through agents, and if you did who was or were the agent or agents. Say, also, if, in what you say, you give your personal knowledge or speak from information derived from your agent or any other person.

Ans. I never made any contract of any kind with Shause.

Cross-interrogatories for Shause's heirs:

298 1. State all you know of any transfers having been made of the McClelland, Chenault & Co. claim, & who has held it either as owner or as collateral security, explaining fully all transfer' of it, the consideration paid or promised therefor.

Ans. I have no knowledge of transfers referred to.

2d. Did Shause, when he withdrew from the firm of Taylor, Shelby & Co., withdraw any of the assets thereof; if not, what became of the assets of said firm? State fully what arrangement was made in regard to said assets.

Ans. I cannot say whether Shause withdrew any of the assets or not, as I never knew anything about his business; I presume that the assets of the firm were under the control of the two remaining partners for purposes of liquidation, but I had nothing to do with the business of Taylor, Shelby & Shause, and cannot say what arrangements were made in regard to said assets beyond the fact that they proved insufficient to pay off the liabilities of Taylor, Shelby & Shause.

J. WARREN GRIGSBY.

The deposition of G. B. Kinkead, referred to in the master's report, is as follows:

299 Interrogatory first. What is your residence and occupation?

Ans. My residence is Lexington, Ky., and my occupation the practice of law.

Int. 2d. Were you ever counsel for C. W. Purcell & Co., of Richmond, Va., or for the Farmers' Bank of Virginia, or both of them, in the collection of a debt from Taylor, Shelby & Co., of Lexington, Ky.? If so, describe said debt, and state when you became and when you ceased to be such counsel. State whether your recollection of any matter referred to in your answer to this or any subsequent interrogatory is refreshed by reference to any document; and, if so, file the same with your deposition if feasible.

Ans. I was employed in the year 1857 or 1858, I think, by W. H. McFarland, president of the Farmers' Bank of Virginia, to look after some claims the bank held on Taylor, Shelby & Co., of Lexington, Ky. Mr. McFarland visited Lexington in person, and he either left with me, or I received shortly afterwards, some claims held by C. W. Purcell & Co., of Richmond, Va., against the same parties. When I say these claims were left with or sent to me, I do not mean to say the written memorials of the debts were in my possession at the time. I have no

recollection that they were. The indebtedness of Taylor, Shelby &
300 Co. to both the bank & Purcell & Co. was large, but I cannot state the amount, and my impression at this distance of time is that I never knew distinctly how the bank & Purcell stood to each other in their several claims. I thought their claims in some way I did not know were united. I corresponded first with Mr. McFarland, copies of which letters I have, and the originals have just been inspected by me. I afterwards corresponded with Purcell & Co.; copies of most of my letters, if not all of them, I have. Also these letters are subject to the inspection of either party to this suit. My first letter to Purcell & Co. is dated Mar. 29, 1860. From a letter now before me from McFarland, dated Feb. 14, 1860, I presume M'r Purcell was in Lex. for the first time in Feb. or March of that year on his way to Chicago, for M'r McFarland's letter speaks of his, "Purcell," purpose "to decide upon the proposition to convey Chicago property"; after this my correspondence seems to have been with Purcell, not McFarland, my last letter to Purcell being 20 Nov., 1860. If I ever wrote after this I have no copy
of it, and I have not seen among my papers any letter from them.
301 When the war came on the following spring all intercourse was suspended.

Int. 3rd. State whether, during the time for which you were counsel for said Purcell & Co. and said bank, any of your said clients or any agent of theirs was in Kentucky; and if so, at what time or times, and whether you had the entire conduct and management of their claim.

Ans. As I stated above, M'r McFarland was in Lexington, Kentucky, when I was first employed in the case, but not afterwards. I presume it was in Feb. or March, 1860, that M'r Purcell was first in Kentucky. I am uncertain whether he was here again. I cannot say I had the management of the debt. M'r Taylor was the active partner of Taylor, Shelby & Co., and he made such a variety of propositions for settlement that I always referred them to my clients and acted under their instructions each time. In this way only can I say that I had the management of the claims.

Int. 4th. State whether you ever made any collections or account
302 of said claim; and if so, give the dates, amounts, and from what sources made.

Ans. I do not think I collected any money on the claims. I have found no memorandum among my papers to show that I did. There was a note of the Cochrans for over $2,000, which I find from one of my letters I sent to McFarland, which I have no doubt was paid. This letter is dated Nov. 22d, 1858. In this I say: "I enclose the note of Cochrans. It will, I think, without no doubt be punctually paid."

Int. 5. State whether during the time you acted as counsel as aforesaid any collaterals or choses in action were transferred to you for the purpose of securing or paying said debt, and particularly whether any such transfer was made at or after the confession of a judgment by Taylor, Shelby & Co. in Fayette circuit court in 1860. If any such collaterals or choses in action were transferred to you describe the same. State when, by what person, and for what purpose such transfer was made, and what disposition was made of said collaterals by you.

303 Ans. During the time I was counsel *During the time I was counsel* as aforesaid a number of pieces passed through my hands to my clients, as my correspondence shows. In these Messrs. Milligen & Gamble, Mr. Theodore Johnson, Wm. H. Settle, and others, whose names I do not recal', figured. I never accepted of any of them in discharge of any part of the debt, but communicated them to my clients &

was governed by them in regard to them. My opinion is nothing was realized from any of them. I do not recollect of any that were in my hands after the confession of judgment at the August term of the Fayette court except a note on S. J. Walker, nor do my letters show any other so far as I been able to see them. This was a note for $4,580 as appears from my letters and was never taken in discharge of any part of the balance due from Taylor, Shelby. I refused to receive it in that way, but only held it so that if it should be paid my clients would get the benefit of it. I had no confidence that it would be paid. I wrote to Mr. Walker that I had it. This note, as I found from one of my letters, dated June 21, 1860, and was due at twelve months with interest, and was payable to Taylor, Shelby & Co. In October, 1863, I called Mr. Walker's attention by letter to the note, hoping he would pay it and I would hold it for my clients. Mr. Walker replied to me in a letter now before me dated Nov. 16, '63.

I give here a copy of it:

304 COVINGTON, *Nov.* 16, 1863.

G. B. KINKEAD, ESQ.,
Lexington, Ky:

MY DEAR SIR: On my return from Chicago I found your favor of the 26th ult. calling my attention to my note held by you for benefit of Purcell & Co. & Farmers' Bank of Virginia. I will be in your city within a few days, when I will call to see you in regard to the matter, explain an arrangement that I intended for the payment of the note.

Very truly y'rs,
(Signed) S. J. WALKER.

It is hardly necessary to say no arrangement was made by Mr. Walker for its payment. None was made which ended in the payment of any part of it to me. After this and not very long before Mr. R. Pindell's death showed me authority from my clients to surrender to him as their counsel whatever papers I had, which I did. I have no recollection now what other papers there were besides this Walker note. I think there were some old bills of exchange on insolvent parties which were considered worthless by my clients. I cannot remember whether I took a receipt from Mr. Pindell or required him to leave the order of my client with me; and I have not had time to and have
305 not searched for it. I gave the papers to Mr. R. Pindell, telling him at the time he must save me at least $150 out of anything he made out of Walker as some compensation for my great trouble in regard to the matter. I was very far from considering this a full compensation for my services, but as there was a poor prospect of getting any I was willing to put up with this. I got nothing from Pindell and $150 is all I ever received from my clients. I have no knowledge whether Walker ever paid Pindell anything on the note. From my own memory I cannot state when Mr. Pindell died, for I remember dates of events badly except as I can connect them with circumstances that make a deep impression me. I cannot tell when I gave Pindell the note; I would say it was a year or eighteen months before he died. It may have been two years.

Int. 6th. State whether, while acting as counsel as aforesaid, you knew that J. Warren Grigsby was a member of said firm of Taylor, Shelby & Co., and whether you ever collected any portion of the said debt from him, and if not for what reason such a collection was not made. State whether you knew that said Grigsby owned prop-
306 erty in Chicago, or whether he had conveyed any property he had

owned there, by deed of trust or otherwise, or whether you had any information of such facts.

Ans. I cannot state when Grigsby became a member of the firm of Taylor, Shelby & Co., nor when I knew it. Indeed, I can't say I knew it at law. I have no recollection of ever talking with him on the subject. I had heard, but I cannot fix when, that he had assigned all his property in Chicago to Mr. Pindell. I considered him insolvent, and a judgment in Kentucky against him I would have considered altogether unavailable. I never collected any part of said debt from him. I had no knowledge in regard to his Chicago property, and suppose Mr. Purcell looked into that when he was in Chicago in 1860, and when he was I understood he took property from Taylor, Shelby & Co., or Taylor, in part of the debt; and I wish to state that from my letters I perceive that I asked and received from Mr. Purcell a statement of the account with Taylor, Shelby & Co. and him, and also the bank, that I might let the judgment be rendered on that statement, and it was furnished and the judgment confessed accordingly. I have a distinct recollection that the matters had been so transacted with Taylor and my clients by the letters that I did not know how they stood with each other, and I resorted to this method to make things certain. After the war
307 closed Mr. Taylor proposed to me to accept the notes of the Farmers' Bank in discharge of the debt. I decline' doing it and wrote to Mr. McFarland his proposition. I beli*e*ved nothing ever came of this. I presume there was no payment by Taylor, Shelby & Co. after the confession of judgment; my recollection is, the confession was made with the credit of the Cochran debt and the value of the Chicago property taken the spring before by Purcell. From and after that time I find among my papers nothing to indicate that there was anything in my hands except the Walker note. I believe I have given all the information pertinent to the case which my memory or my letters furnish. The lapse of so many years, filled up with so much of excitement, no doubt has obscured many things from my memory.

And further saith not.

GEO. B. KINKEAD.

The exception of W. H. Thomas is as follows:

W. H. Thomas excepts to so much of said deposition as appears to be founded on hearsay, also to so much as purports to state the substance of records or writings of any description.

H. C. PINDELL,
For Thomas.

308 The complainants' exceptions to testimony, referred to in master's report, is as follows:

Complainants except to the depositions and parts of depositions on file in this cause, as follows:

1st. To so much of answer No. 2 in the deposition of E. H. Taylor, jr., taken Oct. 21st, 1872, as states that witness paid the bill of exchange for $7,650.00 to Theodore Johnston, because said answer is irrelevant.

2d. To answer to question 5th, for irrelevancy.

3rd. To answer to cross question 8, for irrelevancy.

4th. To so much of the deposition of said Taylor taken M'ch 20th, 1874, and filed M'ch 21st, 1874, as states facts derived from the books of Taylor, Shelby, and to all statements not made of witnesses own knowledge.

5th. Complainants also except to the reading of any affidavit as evidence.

W. O. HARRIS, *Sol'r.*

The advertisement referred to is as follows:

The firm of Taylor, Shelby & Co. is this day dissolved by mutual consent, William Shouse withdrawing.

(Signed) E. H. TAYLOR,
ISAAC SHELBY,
WILLIAM SHOUSE.

JULY 11, 1857.

The undersigned have this day formed a partnership and will continue the business of the old house under the same name.

(Signed) E. H. TAYLOR,
ISAAC SHELBY,
J. WARREN GRIGSBY.

LEXINGTON, KY., *July* 14, 1857.

It is agreed that the above are true copies of the advertisements published in the Lexington Observer & Reporter, on the days of their respective dates and for several days thereafter, and may be introduced herein as evidence thereof.

W. O. HARRIS,
For Compl'ts.
FOX & TWYMAN,
For Deft.
BARR, GOODLOE & HUMPHREY,
For Shouse's heirs.
H. C. PINDELL,
For Apperson & Thomas.

309 The claim of Moore & Caulfield referred to is as follows:

Claim of Moore & Caulfield.

Trust-fund conveyed by Grigsby to Pindell in a/c with Moore and Caulfield.

To prof. services rendered at Chicago during the years 1865, '66, '67, '68, '69, & 1870, including contract with Walker, examination of abstracts, protracted consultations with parties, & negotiations, &c., &c.; the various items charged on our books were burned & cannot be specifically remembered, but amounted in the aggregate to at least $500 00

MOORE & CAULFIELD.

Circuit court of United States, district of Kentucky.

In matter of claim of Moore & Caulfield, filed in suit of C. W. Purcell, &c., vs. Warren Grigsby, &c.

The affiant of S. M. Moore states that he is a resident of the city of Chicago, State of Illinois, and senior member of the firm of Moore & Caulfield, attorneys at law; that the foregoing account for professional services rendered in connection with the trust-fund conveyed by Grigsby to Pindell is just and proper and has not been paid.

S. M. MOORE.

STATE OF ILLINOIS,
Cook County, City of Chicago, ss:

I, Theodore Schintz, a notary public in and for the city aforesaid, do hereby certify that the above affidavit was subscribed and sworn to before me this 15th day of February, 1873.

[SEAL.] THEODORE SCHINTZ,
Notary Public.

310 The report of the receiver, filed May 2d, 1874, is as follows:

Report of receiver.

Circuit court U. S., K'y dist.

PURCELL ET AL. }
vs. } Report of receiver.
GRIGSBY ET AL. }

As receiver in this cause I have received the following notes, to wit: 2 notes of H. E. Pickett, to the order of Sam'l J. Walker, dated May 31st, 1870, and a relinquishment of S. M. Moore to the proceeds of a similar note, destroyed by the fire in Chicago, for $9,750 each; also 2 notes of Brian Philpot to the order of Sam'l J. Walker, dated Oct. 14, 1870, for $6,660 each; also one note of E. H. Pickett to the order of Sam'l J. Walker, for $7,500. All of the above notes bearing interest at the rate of 6 per c't per annum.

Account of receipts and disbursements as follows:

1872.			
May 30.	Proceeds of principal of note		9,750 00
" "	Interest thereon, 2 years		1,170 00
Sept. 4.	Proceeds of principal of note		9,750 00
" "	Int. from May 31st, 1870		1,316 25
1873.			
July 20.	Proceeds of principal of note		9,750 00
" "	Interest from May 31, 1870		1,835 25
	Whole amount received		33,571 50
1872.			
May 30.	By am't of expenses of self to Chicago	51 00	
Aug. 4.	" " " " " " " "	53 00	
1873.			
Feb'y 27.	" " " " " Harris "	54 20	
April .	" " " " " Harris "	98 50	
July 31.	" " " " " " "	55 00	
Nov. 20.	" " " " " self	53 00	
1874.			
April .	Costs of abstract, $100.00, & p'd Beattie, 25.25	125 25	
	W. O. Harris, 500.00; Gwynn Garnett, $200.00, att'ys	900 00	
311	3 per c't comrs. for collecting, &c	1,007 13	
			2,197 08
	Balance on hand		$31,374 42

There is also due from the Kentucky National Bank an amount for interest not fixed, which will be reported at a future time.

There remains in my hands three notes uncollected, all of which are in the hands of Gwynn Garnett, my attorney in Chicago, who has been instructed to enforce collection as soon as possible. My advices from him are that the two notes of Philpot must be collected by a suit in chancery, and proceedings have been instituted for that purpose. The note of Pickett for $7,500 with interest is secured by trust deed on real estate in Chicago. For the purpose of enforcing payment the trustee has been instructed to advertise and sell according to the provisions of the trust-deed. It is probable that it may be necessary for me as receiver to purchase this piece of property and hold temporarily to prevent a sacrifice. It is proper for me state that in the great Chicago fire all the titles to the property held to secure these note were destroyed, and has entailed a great deal of trouble and delay in preparing to enforce collection, the notes remaining unpaid.

The am'ts paid Harris & Garnett on account of services as attorneys.

W. A. MERIWETHER,
Receiver.

312 And on another day of our said term of our said court, to wit, on Tuesday, July 28th, 1874, came Susan P. Grigsby, by Fox & Twyman, her counsel, and filed her exceptions to the commissioner's report. Came also J. Warren Grigsby, by same counsel, and filed his exceptions to the commissioner's report.

The exceptions of Susan P. Grigsby, above referred to, is as follows:

Exceptions of Susan P. Grigsby to com'r's report.

The claimant, Susan P. Grigsby, comes & excepts to the report of the commissioner filed herein, & for grounds of exceptions, says: 1st, the commissioner erred in refusing to allow the debt of the Agricultural Deposit Bank & interest paid by her; 2d, in refusing to allow the debt of the Commercial Bank at Harrodsburg & interest paid by her; 3rd, in refusing to allow the debt U. H. Walter & interest paid by her; and 4th, the debts amounting to about $3,500 & described in the deed of trust as current expenses, and the debt of Solon Craig & interest paid by her, & the debt of J. P. Fisher & interest paid by her.

313 All these debts had been paid by the claimant out of her own private funds, & classified in the report as Nos. 1, 2, 3, & 4, with subdivisions A, B, & C; and 5th, in allowing to the attorney of the complainant a fee of $3,000 to be paid out of the trust fund as being too large.

FOX & TWYMAN,
For Complainant.

The exceptions of J. Warren Grigsby, above referred to, is as follows:

The defendant, J. W. Grigsby, comes & excepts to the report of the commissioner filed herein, & for grounds of exceptions, says: 1st, the commissioner erred in refusing to allow the credit of the debt of Sam'l J. Walker, taken as collateral by complainant; 2nd, in allowing the claim presented by A. H. Thomas; 3rd, in allowing a fee of $3,000 to attorney of complainants; 4th, in refusing to admit or allow as credit on the debt of complainants the collateral of B. I. Haines, taken by them as surety for their debt, but lost by their want of diligence; 5th, in allowing the debts sued on by complainants; 6th, in the manner of calcu-

lating interest in computing the total interest without stops at
314 the time or date of credits being made on the debts.

FOX & TWYMAN,
For Def't Grigsby.

And on another day of our said term of our said court, to wit, on Friday, July 31st, 1874, came the complainants, by W. O. Harris, their counsel, and filed exceptions to the commissioner's report; came R. Apperson, jr., and W. H. Thomas, by H. C. Pindell, their counsel, and filed their exceptions to the commissioner's report.

The exceptions of complainants above referred to is as follows:

Exceptions of complainants to com'r's report.

The complainants, C. W. Purcell and others, except to the master's report herein in the following particulars and for the following reasons:

I. Because the master erred in not sustaining their exceptions to testimony which were filed before him April 25th, 1874.

II. In allowing the claim of M'r's Susan P. Grigsby.

1st. Because said claimant had no separate estate in the moneys alleged to have been used by her in the purchase and payment of the debts set out in her state' of facts herein.

315 2d. Because there is not sufficient evidence of said payments and purchases.

3rd. Because said claimant is not entitled to a preference in the distribution of the fund in court.

4th. Because there is no sufficient evidence of the existence of the debt of $2,875 to Thomas H. Shelby, trustee for Susan P. Grigsby.

III. In allowing the claim of Moore and Caulfield, there being no sufficient evidence thereof.

IV. In allowing the claim of W. H. Thomas, because there is no evidence that the same was created since the 14th of July, 1857.

V. In allowing the claim of R. Apperson, jun'r, because there is no evidence that the same was created since the 14th of July, 1857.

W. O. HARRIS,
Att'y for Complainants.

The exception of R. Apperson, j'r, above referred to, is as follows:

Exceptions of R. Apperson jr, to com'r's report.

R. Apperson, j'r, excepts to the commissioners' report herein, as follows:

1. Because it allows the claim of the complainants, which is extinguished by the statute of limitations.

2. Because it does not prefer the said Apperson's claim to that of complainants and provide that it shall be first paid.

316 3. Because its effect is to require said Apperson to compensate complainants' attorney for acquiring information already in possession of said Apperson's own attorney.

4. Because it compensates complainants' attorney for the collection of money not yet collected, and which may never be.

5. Because the allowance to complainants' attorney is excessive compensation for the services rendered by him for the common benefit of the creditors.

The exception of W. H. Thomas is as follows:

Exceptions of W. H. Thomas to com'r's report.

W. H. Thomas excepts to the commissioner's report herein as follows:
1. Because it allows the claim of the complainants, which is extinguished by the statute of limitations.
2. Because it does not prefer the said Thomas claim to that of complainants and provide that it shall be first paid.
3. Because its effect is to require said Thomas to compensate complainants' attorney for acquiring information already in possession of said Thomas' own attorney.
4. Because it compensates complainants' attorney for the collection of money not yet collected, and which may never be.
5. Because the allowance to complainants' attorney is excessive compensation for the services rendered by him for the common benefit of all the creditors.

317 *Order of court on exceptions.*

And at another term of our said court, held for its October term, A. D. 1874, to wit, on Wednesday, November 25th, 1874, this cause coming on to be heard upon exceptions to the master's report filed herein on the 24th day of July, 1874, and having been argued by counsel, and the court being now sufficiently advised, doth order and decree that as to the complainants' exceptions No. 1, to the effect that the master erred in not sustaining their exceptions to testimony filed before him on the 24th April, 1874, and returned with his report, it is ordered that the 1st, 2d, and 3rd exceptions filed on that day be and the same are now sustained, and that the 4th and 5th exceptions be and the same are now overruled; that complainants' exceptions No. 2 and its subdivisions be and the same are now overruled; that complainants' exceptions No. 3, as to the debt of Moore & Caulfield, be and the same is reserved by the court for future action, with leave to the complainants to file additional proof said debt; that complainants' exceptions No. 4 to the debt of W. H. Thomas be and the same are hereby sustained; and that complainants' exceptions No. 3 to the debt of R. Apperson, jr., be and the same are hereby over-
318 ruled; that as to the exceptions of defendant, J. W. Grigsby, filed to the report of said master, it is ordered that exception No. 2, as to the debt of W. H. Thomas, be and the same is hereby sustained, and that the exceptions Nos. 1, 4, 5, and 6 be and the same are hereby overruled; and that the exception No. 3, as to the fee allowed the complainants, be and the same is reserved for future action; that the exceptions of claimants, Susan P. Grigsby, to the master's report be and the same each and all are hereby overruled; that as to the exceptions of R. Apperson, jr, to said report, Nos. 1 and 2, it is ordered that the same be and the same are overruled; and that exceptions by same, Nos. 3, 4, & 5, relating to the fee allowed complainants, are reserved for future action.

It is further ordered that the master be allowed three hundred dollars for said report, and is allowed to withdraw the same. The said W. H. Thomas, by his counsel, H. C. Pindell, excepts to so much of the above order as sustains the exception as to the allowance by the commissioner of his claim.

Order of court.

And on another day of our said term of our said court, to wit, on Monday, November 30th, 1874, it appearing to the court that the following-named corporations and individuals, namely, the Branch of
319 the Bank of Kentucky at Danville, the Central Bank of Kentucky at Danville, John R. Desha, R. Brown, B. B. Sayre, the Northern Bank of Kentucky at Lexington, the Branch of the Bank of Kentucky at Lexington, are named in the deed of trust from Grigsby to Pindell as holding securities and evidences of debt, the payment of which is provided for in the second and third classes of creditors in said deed, and the debts mentioned in the first class being *being* already before the court in the person of Mrs. Susan P. Grigsby, it is therefore ordered by the court, upon its own motion, that the said corporations and individuals be made parties to this cause before any distribution is made herein.

And thereupon came the complainants, by W. O. Harris, their counsel, and filed their amended bill herein.

The amended bill above referred to is as follows:

Amended bill.

In the circuit court of the United States for the district of Kentucky.

The amend' bill of C. W. Purcell & others to their bill of complaint filed in court on the 4th of August, 1871.

Said complainants, C. W. Purcell & others, by the direction of the court, amend their bill and state that the assignment or deed of
320 trust from J. Warren Grigsby to R. Pindell, dated the 10th day of December, 1857, and set out in their original bill, contained the following clause, to wit:

Secondly. And after the payment of said mentioned debts to secure the payment of the following debts and liabilities of the said party: an acceptance by W. F. Roelosson of the draft of said party for $8,323.20 (eight thousand three hundred and twenty-three dollars and twenty cents), due in New York Nov. 9, 1857; a check of Taylor, Shelby & Co. on Shoe and Leather Bank, N. Y., due Oct. 1st, 1857, for ten thousand dollars, endorsed by said party and now held by the Branch of the Bank of Kentucky, Danville; two acceptances of Geo. N. Sanders for six thousand dollars each of the drafts of W. F. Roelosson, endorsed by said party of the first part or S. P. Grigsby, held by the Central Bank of Kentucky at Danville, and past due; a note of Isaac Shelby, jun'r, with Isaac Shelby, sen'r, as security, to John R. Desha, for eight thousand three hundred and fourteen dollars and 75 cents, dated Sept. 30, 1857, and due at four months after date, given for the benefit of Taylor, Shelby & Co.; an acceptance of a draft for fifteen thousand nine hundred dollars, drawn by R. Pindell, accepted by Isaac Shelby, endorsed Ja's B. Clay, dated Sept. 5, 1857, and due in ninety days, now held by R. Brown, and given for the use of the house of Taylor, Shelby
321 & Co.; a note of Isaac Shelby, with James B. Clay as security, held by B. Sayre, for sixty-four hundred and seventy-five dollars, dated Sept. 25, 1857, and due July 25, 1858, given for the use of the house of Taylor, Shelby & Co.

Thirdly. To secure the payment, after said debts, &c., mentioned, are paid, two notes, one for fifteen thousand dollars, payable at the Northern Bank of Lexington, one for ten thousand dollars to the Branch of

the Bank of Lexington, Ken., both dated Sept. 28, 1857, due at four months, and executed by Taylor, Shelby & Co., with Tho's H. Shelby as security.

Wherefore the said complainants, by direction of the court, amend their said original bill by making parties thereto the Central Bank of Kentucky at Danville, the Bank of Kentucky, John R. Desha, R. Brown, B. B. Sayre, and the Northern Bank of Kentucky, and ask that *that* they be compelled to answer, setting up any claim they may have in the fund in controversy in this cause.

And may it please your honor to grant unto them the writ of subpœna, &c.

W. O. HARRIS,
Solicitor for Complainants.

Upon which amended bill the following subpœna in chancery issued:

Subpœna.

The President of the United States of America to the marshal of the Kentucky district, greeting:

322 You are hereby commanded to summon the Central Bank of Kentucky at Danville, the Branch of the Bank of Kentucky at Danville, John R. Desha, R. Brown, B. B. Sayre, the Northern Bank of Kentucky at Lexington, the Branch of the Bank of Kentucky at Lexington, to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal Court Hall, in the city of Louisville, on the 1st Monday in January next, to answer a bill in equity and amended bill exhibited against them in our said court by C. W. Purcell & Co. & others, which they shall in no wise omit, under the penalty of four hundred dollars.

And have you then there this writ.

Witness the honorable M. R. Waite, Chief Justice of the Supreme Court of the United States of America, and the seal of our said court hereto affixed, at the clerk's office of said court, in Louisville, this 5th day of December, A. D. 1874, and in the ninety-ninth year of our Independence.

Attest:
[SEAL.]

W. A. MERIWETHER,
C. C. C., K. D.
By SAM. B. CRAIL, *D. C.*

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office on or before the 4 day of January next, the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

W. A. MERIWETHER, *Clk.*
By SAM. B. CRAIL, *D. C.*

323 Upon which the marshal made the following return, viz:

Marshal's return.

Executed by delivering to M. C. Johnson, president of the Northern Bank of Kentucky, at Lexington, on Clifton Rodes, president of the Central Bank of Kentucky, but now the Central National Bank of Danville, at Danville, and to James Kinnaird, s'r, president of the Branch

of the Bank of Kentucky at Danville, each a copy of this chancery subpœna this 12 day of Dec'r, 1874. The Branch Bank of K'y having been long since removed from Danville, on John Desha by delivering to him a copy of this chancery subpœna this 12th day of Dec., 1874.

E. H. MURRAY, *U. S. M.*,
By J. H. HARRISON, *Sp'l Dep'y.*

Executed on B. B. Sayre, by delivering to him a copy of this chancery subpœna this 8th Dec., 1874.

E. H. MURRAY,
U. S. M., K. D.,
By HENRY CRITTENDEN,
Sp'l Dep'y.

Appearance of R. W. Brown & others.

And on another day of our said term of our said court, to wit, on Wednesday, January 13th, 1875, came R. W. Brown, John R. Desha, B. B. Sayre, and the Central Bank of Danville, K'y, by F. T. Fox, j'r, their attorney, and enter each and all their appearance herein to the
324 amended bill of complaint filed herein on a former day of the court, and acknowledge by a release filed this day payment of the several debts mentioned in said amended bill as due and owing to each of said parties from Taylor, Shelby & Co., or J. Warren Grigsby, as set forth in the deed of trust from said Grigsby to Richard Pindell, deceased.

The releases above referred to are as follows:

Release of R. W. Brown.

LEXINGTON, K'Y, *Dec'r 26th*, '74.

I hereby authorize F. T. Fox, j'r, to enter of record my acknowledgement that I have no claim against the house of Taylor, Shelby & Co., nor against J. W. Grigsby under the deed of trust of Grigsby to R. Pindell, in the case of Purcell vs. Grigsby, now pending in the U. S. circuit court.

R. W. BROWN.

Release of Jno. R. Desha.

LEXINGTON, K'Y, *Dec'r* , 1874.

I authorize hereby F. T. Fox, j'r, to enter my appearance in the case of Purcell vs. Grigsby, now pending in the U. S. circuit court, and acknowledge of record the payment of my claim against Taylor, Shelby & Co., mentioned in the deed of trust of Grigsby to R. Pindell.

JNO. R. DESHA.

Release of B. B. Sayre.

FRANKFORT, K'Y, *Dec. 9th*, 1874.

I authorize hereby F. T. Fox, j'r, to enter my appearance in the case of Purcell vs. Grigsby, now pending in the U. S. circuit court
325 and to acknowledge of record the payment of my claim against Taylor, Shelby & Co., mentioned in the deed of trust of Grigsby to R. Pindell.

B. B. SAYRE.

Release of Central Bank of K'y.

DANVILLE, K'Y, *Dec. 5th*, 1874.

I authorize hereby F. T. Fox, j'r, enter my appearance in the suit of Purcell vs. Grigsby, now pending in the U. S. circuit court, and to acknowledge of record the payment of the claim of the Central Bank of Kentucky against Taylor, Shelby & Co., mentioned in the deed of trust of Grigsby to R. Pindell.

CLIFTON RODES,
President of said Bank.

And on another day of our said term of our said court, to wit, on January 26th, 1875, came the Bank of Kentucky, by J. K. Goodloe, its counsel, and filed its answer herein.

The answer above referred to is as follows:

Answer of Bank of K'y.

Circuit court of the United States, 6th circuit, & district of Kentucky.

C. W. PURCELL, &C., COMPL'TS, }
vs. }
J. WARREN GRIGSBY, &C. }

The seperate answer of the Bank of Kentucky to the amended bill of complaint of the complainants, filed Nov. 30, 1874.

326 The defendant, the president, directors, & company of the Bank of Kentucky, by Thomas L. Barret, president of said corporation, reserving, &c., for answer to the amended bill of complaint filed herein on the 30th of November, 1874, making said corporation a party defendant in this suit, and calling on it to set up any claim it may have on the fund in controversy in this cause, says: It admits that at the date of the deed of trust made by the defendant Grigsby to R. Pindell, filed in the pleadings of the cause and marked "A," the said corporation held and owned a check of Taylor, Shelby & Co., the said defendants, Grigsby, being a member of said firm, on the Shoe and Leather Bank, New York, due Oct. 2, 1857, for ten thousand dollars, endorsed as stated in said amended bill, and also a note executed by said Taylor, Shelby & Co., with Thomas H. Shelby as security, for ten thousand dollars, the same being dated September, 1857, and payable four months after date. These evidences of debt were delivered up to said Taylor, Shelby & Co. prior to the institution of this suit upon their giving to said corporation certain bills of exchange on S. J. Walker & Robelfinson therefor.

Wherefore, having fully answered, this defendant prays to be dismissed, with costs, &c.

327 The president, directors, and company of the Bank of Kentucky,
By THOMAS L. BARRET, *P't.*

And at another term of our said court, held for its February term, 1875, to wit, on Monday, February 15th, 1875, came W. A. Meriwether, receiver herein, and filed his supplemental report herein:

Decree.

This cause coming on to be heard upon the exceptions to the master's report left open by a former order, and having been argued by counsel for all parties, and the court being now sufficiently advised, doth order and decree that the exception of R. Apperson, j'r, to the amount of the fee allowed complainants' counsel, which exception was filed July 31st,

1874, and is numbered 5, be, and the same is hereby, sustained, and the allowance is rejected. It seems to the court that an allowance to the counsel of one thousand dollars is reasonable and proper, and that said sum should be paid rateably by all the parties irrespective of the classes in which they stand under the deed of trust.

And it appearing from the report of the receiver this day filed that there is in his hands for distribution the sum of thirty-two thousand four hundred and seventy dollars and thirty cents, and the cause having been further and fully argued by all the counsel upon the direc-
328 tions for final decree, & the court being now sufficiently advised, doth order and decree that the parties are entitled to the fund in court in the proportions indicated in the master's report, as modified by the court in its ruling upon exceptions thereto. That is to say, that Susan P. Grigsby is entitled to the sum allowed her by the master, with an additional allowance of interest at six per cent. up to Feb'y 11th, 1875, amounting $22,457.35, from which is to be deducted her share of $1,000 fee allowed, 704.30, leaving a balance of $21,753.05, which the receiver is ordered to pay to her.

It is ordered that the receiver pay the complainant's counsel the fees allowed him of $1,000.00. He is ordered to retain in his hands, subject to the orders of this court, upon the claim of Moore & Caulfield, the sum of $500.00. It seems further to the court that of the balance of the fund complainants are entitled to the sum of $7,086.88, from which is to be deducted their portion of $1,000.00 fee, 222.29, leaving a balance of $6,864.59, which the receiver is ordered to pay to them.

It seems also the court that P. Apperson, j'r, is entitled out of said balance to the sum of $2,340.24, from which is to be deducted his proportion of $1,000 as aforesaid, 73.40, leaving a balance of $2,266.83, which the receiver is ordered to pay.

All which amounts to the sum of $32,470.30, which is the amount of the fund in court.

329 And this cause is retained for further action of the court upon the claim of Moore & Caulfield, and for the distribution of said other funds as may come to the hands of the receiver.

The receiver's supplemental report above referred to is as follows:

Supplemental report of receiver.

Circuit court of the United States for the district of Kentucky.

C. W. PURCELL & OTHERS
vs.
J. WARREN GRIGSBY & OTHERS.

Supplemental report of receiver.

I, William A. Meriwether, appointed by the court receiver in this cause, do make the following supplemental report:

I stand charged in my former report filed May 2nd, 1874, with the sum of		31,374 42
I have since collected from the Kentucky National Bank the interest referred to in that report, amounting to	$1,610	
I am chargeable under agreement with 4 % int. on the fund since former report	618	
		2,228 00
		33,602 42

Credit by am't paid for abstract of title in Chicago	$125	
Paid Cooper, Garnett & Packard sundry costs and legal services	662 12	
Expenses to Chicago July, 1874	45	
Paid Ja's A. Beattie, com'r	300	
		1,132 12
Balance in my hands Feb'y 11, 1875		$32,470 30

330 Which said sum of $32,470.30 is in my hands for distribution. All of which is respectfully reported this 11th day of Feb'y, 1875.

W. A. MERIWETHER,
Receiver.

And on another day of our said term of our said court, to wit, on Wednesday, February 17th, 1875, came the defendants, Susan P. Grigsby, by F. T. Fox, her counsel, and filed her petition for a rehearing of this cause.

The petition for rehearing above referred to is as follows:

Petition of Susan P. Grigsby for rehearing.

In the circuit court of the United States for the district of Kentucky.

C. W. PURCELL ET ALS, COMPLAINANTS,
vs.
J. WARREN GRIGSBY ET ALS, DEFENDANTS.

Petition for rehearing.

The humble petition of Susan P. Grigsby, a claimant under and against the trust-fund sought to be distributed herein, showeth:

1st. That by the decree dated 15th February, 1875, made by his honor Judge Bland Ballard in the aforementioned case, it was
331 ordered that the said complainant, Susan P. Grigsby, should pay to the counsel of the complainants hereto the sum of $704.30 out of the sum of $22,457.35 (being principal and interest) of the amount allowed of said fund by the master commissioner to the said claimant as her rateable proportion of the fees due the said attorney from complainants.

2nd. That by order dated 25th November, 1874, made by his Hon. Judge Ballard in said aforementioned cause, it was ordered that exceptions Nos. 1, 2, 3, 4, & 5, by this said claimant, Susan P. Grigsby, to the report of the master commissioner heretofore made herein rejecting certain claims of said claimant set forth & described in said exceptions be & the same were overruled, and by the said decree made on Feb'y 15th, 1875, ordered that said report should be sustained except as modified therein.

Your petitioner therefore humbly prays your honor that said aforementioned cause may be reheard before your honor for further directions on said master's report, and that the order of the 25 November, 1874, made by your honor & the said decree made on 15 Feb'y, 1875, made by your honor may be reversed or varied and that it may be declared, & such other orders & decrees may be made as your honor may seem meet & the circumstances of the case may require.

332 We humbly conceive that the special order & final decree mentioned & referred to are respectively proper to be reheard before your honor if your honor shall think fit.

FONTAINE T. FOX, JR.,
BUFORD TWYMAN.
Counsel.

Order overruling petition of Susan P. Grigsby.

And on another day of our said term of our said court, to wit, on Monday, February 22d, 1875, the court being now fully advised of and concerning the petition and motion of Susan P. Grigsby for a rehearing herein, it is ordered and decreed that said petition and motion be and the same is hereby overruled.

Appeal prayed by J. W. Grigsby.

And on another day of our said term of our said court, to wit, on Tuesday, February 23rd, 1875, came the defendants, J. Warren Griggsby and Susan P. Griggsby, by F. T. Fox, j'r, their counsel, and pray an appeal from the decree rendered in this cause to the Supreme Court of the United States, which appeal is granted.

And on another day of our said term of our said court, to wit, on Tuesday, April 21st, 1875, came W. A. Meriwether, receiver herein, and filed his report.

The report above referred to is as follows:

333 *Report of receiver.*

In the circuit court of the United States for the district of Kentucky.

C. W. PURCELL & OTHERS
vs.
J. WARREN GRIGSBY & OTHERS.

Additional report of receiver.

William A. Meriwether, receiver, &c., for an additional and full report of his acts and doings as such receiver, states to the court that of the notes placed in his hands for collection and safe-keeping in this cause he has collected and accounted for three notes of nine thousand seven hundred and fifty dollars ($9,750.00) each and interest thereon, as shown by his original report, and for certain interest upon the fund in his hands, as shown by his first amended report.

Of the fund so produced, and amounting to the sum of.....	32, 470 40
the receiver has paid out, in pursuance of the final decree, the following sums to the following per-ons, viz: to M'r's Susan P. Grigsby, as shown by the receipt of her counsel herewith returned and marked "A," the sum of	21, 753 05
To W. O. Harris, counsel of compl'ts, the sum of. (as shown by his receipt marked "B.")	1, 000 00
334 To complainants for clerks, marshals, and master's costs, as shown by receipt of W. O. Harris marked "C"	85 83

To complainants, as shown by the receipt of W. O. Harris, their counsel, marked "D," the sum of	6,864 59	
To R. Apperson, j'r, as shown by the receipt of H. C. Pindell, his counsel, the sum of	2,266 83	
And the receiver holds, under the order of the court, the sum of	500 00	
		$32,740 40

There yet remain in the hands of the receiver uncollected, except as hereinafter shown, the following notes:

1st. A note, Oct. 13th, 1870, signed by Henry E. Picket, payable to and endorsed by Sam'l J. Walker, and due 18 months after date, for the sum of $7,500.00 and 6% interest from date.

On the 5th of September, 1873, the receiver deeming it best for the interest of the fund and acting under the advice of counsel in Chicago, agreed with Walker, who was the principal debtor in this note, to extend the time for the payment thereof for three months, in consideration of which agreement said Walker executed a deed to Gwynn Garnett whereby he conveyed to him lots 25, 26, and 27 in Walsh's subdi-
335 vision of block 27, in Walsh & McMullin's subdivision in the southeast quarter of section 20, township 39 north, range 14 east, of the 3rd principal meridian, in trust, that in case of default of payment of said note at the expiration of said 3 months said trustee, upon the application of this receiver, should sell said property, and pay the debt and cost of sale. Said default having occurred, said trustee did, on the 29th of May, 1874, after due demand and notice, expose said property for sale, and the same was bid in by the receiver for the sum of $6,000. This purchase was made in the best interest of creditors. Walker and Picket being then regarded as insolvent, and the receiver being advised that the property was worth as much as the face of the note, it was conveyed to Seard. He now holds the deed of said Garnett, trustee, and has paid the cost of sale, amounting to $149.80, with which he is credited in a former report, and the balance of his bid, amounting to $5,850.20, appears credited on the back of the note. He has also obtained judgment against Picket and Walker for $3,392.20, the balance due on the note, which judgment, as he is advised, is worthless by reason of the insolvency of said parties.

2nd. Two notes of Brian Philpot, dated Oct. 14, 1870, payable
336 one year after date, to the order of Sam'l J. Walker, and endorsed by him, and bearing 6 % interest from date, each for the sum of $6,660.00.

These notes were originally secured by deed of trust from Philpot to Samuel M. Moore given cotemporaneously with their dates, but which was destroyed in the fire of 1870.

On the first day of November, 1873, the same was removed and replaced by another deed of like tenor, and on the 2nd day of January the property conveyed was sold by the trustee at public auction, and bid in by the receiver at the sum of $9,225.00 in order to avoid a sacrifice. Out of that sum the receiver has paid and received credit in a former report the costs of sale, amounting to $232.87, and of the balance $8,992.13 was applied in payment of the first note, and $647.15 was applied on a credit upon the second note.

The receiver has also sued Walker, as mentioned in his report upon the Picket, and obtained judgment in the superior court of Cook County, Illinois, on the 24th day of July, 1874, for the sum of $19,645.43, this

being the amount of the 3 notes less the credit of $5,850.20 upon the note of $7,500. Said judgment is now entitled to the additional credit of $9,639.28, the net proceeds of the last sale.

No suit has been brought against Philpot, the receiver being
337 advised that he is insolvent and that a judgment would be worthless.

The property purchased at the sale last mentioned fronts 171 feet on Lumber street in Chicago, and extends back along an alley 168.4 feet to O'Neil street, and thence extends west along O'Neil street 168 feet; said alley which bounds said lot on the east being about 116 f't west of Halstead street. A plat of said ground is the possession of the receiver, and is subject to the inspection of the parties.

RECAPITULATION.

The receiver has judgment against S. J. Walker, July 24, 1874, for the sum of	$19,645 43
which is subject to credit of $9,639.28, and is regarded worthless.	
He has also judgment vs. Henry E. Picket, January 11, 1875, for	$3,392 21
Also regarded as worthless.	
He holds a conveyance from Gwynn Garnett, trustee, of property purchased for	$6,000 00
He holds a conveyance from Sam'l M. Moore, trustee, of property purchased for	$9,225 00
Being total of property purchased	15,225 00

The receiver has placed the property in the hands of a real-estate agent with instructions to offer the same for sale and to report
338 any bid made, but has thus far received no offer. He is advised by those whom he considers good judges of Chicago property that the lots purchased from Garnett are worth $8,000.00, and that the lot purchased from Moore is worth $19,000.00; but those prices cannot be realized without holding the property and waiting for a purchaser.

The receiver reports these facts to the court and asks instructions as to what course he shall pursue with reference to a sale of the property and a final settlement and winding up of his receivership.

W. A. MERIWETHER,
Receiver.

The receipts attached to said reports are as follows:

Received of W. A. Meriwether, receiver in the case of Purcell et al vs. Grigsby et al., the sum of twenty-one thousand seven hundred and fifty-three & .05 ($21,753.05) in full of the claim allowed to Mrs. Susan P. Grigsby by the court in said case.

19 April, 1875.

FOX & TWYMAN,
Per FOX, *Att'ys for Mrs. Grigsby.*

LOUISVILLE, *M'ch 8th*, 1875.

Received of W. A. Meriwether one thousand dollars adjudged to me in the case of Purcell, &c., vs. Grigsby, &c., in the U. S. court
339 and six thousand eight hundred and sixty-four $\frac{52}{100}$ dollars adjudged to the complainants in said cause.

W. O. HARRIS.

LOUISVILLE, *M'ch* 20, 1875.

Rec'd W. A. Meriwether, receiver in case Purcell vs. Grigsby, twenty-two hundred & sixty-six $\frac{3}{100}$ dollars, amount decreed to R. Apperson, j'r, in said cause.

H. C. PINDELL, *Atto.*

Appeal prayed by W. H. Thomas.

And on another day of our said term of our said court, to wit, on Thursday, May 6th, 1875, came the defendant, W. H. Thomas, by H. C. Pindell, his counsel, and prays an appeal from the decree rendered in this cause to the Supreme Court of the United States, which appeal is granted.

Order of court.

And on another day of our said term of our said court, to wit, on Monday, May 31st, 1875, on motion of the complainants and of the claimant, R. Apperson, j'r, by their respective counsel, and it appearing to the court that there are taxes due and outstanding tax titles upon the property purchased by the receiver and reported to the court, it is ordered that the receiver devote the balance of the funds now in his hands to the payment of said tax titles, and the extinguishment of said tax titles, and report his action to the court.

And at another term of our said court held for its October term, 1875, to wit, on Tuesday, October 12th, 1875, on motion of complain-
340 ants, by W. O. Harris, esq., their counsel, and R. Apperson, jun'r, the only other creditor having an interest in the fund, being present, by H. C. Pindell, esq., his counsel, and not objecting, it is ordered by the court that the receiver in this cause do proceed to sell at public auction, at such time and place in the city of Chicago, and after such advertisement as he shall deem expedient, the property mentioned in his last report herein, and that he shall duly report to the court his action under this order.

DISTRICT OF KENTUCKY:

I, Samuel B. Crail, clerk of the circuit court of the United States for the Kentucky district, at Louisville, do certify that the foregoing three hundred and forty pages, this included, contain a true and complete transcript of the record of the proceedings had in the court in the case mentioned in the caption hereof.

Witness my signature and the seal of said court, at Louisville, this 14th day of July, A. D. 1876.

[SEAL.] SAM'L B. CRAIL, *Clerk.*

(Indorsement on cover:) No. 136. J. Warren Grisgby & Susan P. Grigsby, appellants, vs. C. W. Purcell & Co., D. J. Saunders, receiver, &c., & W. B. Isaacs & Co. Kentucky C. C. U. S. Filed 12th August, 1876.

Robert Clarke & Co., Printers, Cincinnati, O. [*Dec.*, 1878.

IN THE

Supreme Court of the United States.

Susan P. Grigsby, individually and as Administratrix of J. Warren Grigsby,
Appellant,

vs.

C. W. Purcell & Co. et al.,
Appellees.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF KENTUCKY.

ARGUMENT OF

HOADLY, JOHNSON & COLSTON, and
JOHN W. STEVENSON,
Of Counsel for Appellant.

Robert Clarke & Co., Printers, Cincinnati, O. [*Dec.*, 1878.

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Appellees.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF KENTUCKY

ARGUMENT OF

HOADLY, JOHNSON & COLSTON, and
JOHN W. STEVENSON,
Of Counsel for Appellant.

THE CASE.

Since this appeal was taken, General Grigsby has died, leaving Mrs. Susan P. Grigsby, his widow, to whom letters of administration of his estate have been granted, and the appeal is now prosecuted by her, in her own behalf and as his administratrix. General and Mrs. Grigsby had no joint interest in the matters in controversy.

Before July 14, 1857, there was in Lexington, Kentucky, a firm of bankers, known as Taylor, Shelby [misprinted "Shelley" in the Record] & Co., composed of E.

H. Taylor, Jr., Isaac Shelby, and William Shouse. On that day, Shelby came to Grigsby's house, in Lincoln county, about forty miles from Lexington, and informed him that the firm had been dissolved—that Shouse had retired—and solicited permission to use his name as a partner in a new firm to be composed of Taylor, Shelby and Grigsby. To this Grigsby consented, and the formation of the new firm was advertised in the Lexington newspapers (Record, p. 119), in these words:

"The undersigned have this day formed a partnership, and will continue the business of the old house, under the same name.

LEXINGTON, KY., *July* 14, 1857. E. H. TAYLOR,
ISAAC SHELBY,
J. WARREN GRIGSBY."

Grigsby testifies that he consented to this proposition, without actually becoming a partner, except as to third persons. (Record, p. 113.) It was a step preliminary to a real partnership, but amounted, meanwhile, as between themselves, only to the loan of his name, to give credit to the firm. Subsequently, Grigsby went to Lexington, where an agreement was made that the old business should be wound up as rapidly as possible, and the house be reorganized on a basis submitted by him, he then to become an actual partner. Shortly after, he went to Virginia, to complete his money arrangements, and while there, early in October, 1857, the firm failed, having been insolvent at the date of Shouse's retirement. (Record, 113, 114.)

Grigsby was the owner of valuable real estate in Chicago, which, on December 10, 1857, he conveyed, in

fee simple, to Richard Pindell, of Lexington (Record, 4), in trust, *first*, to secure

"an acceptance of five thousand dollars of the party of the first part, discounted and now held by the Agricultural Deposit Bank, of Lexington, Kentucky; an acceptance of the same, discounted and now held by the branch of the Commercial Bank of Kentucky, at Harrodsburgh, for twenty-five hundred dollars; . . . . . a note of said party to N. H. Walter, for eight hundred and thirty-seven dollars, due January 1, 1858; . . . . . an amount of about thirty-five hundred dollars, due by said party, in small sums, to various persons, in various places, in Kentucky, principally current accounts of the year.

"*Secondly*. And after the payment of said mentioned debts, to secure the payment of the following debts and liabilities of the said party. (All since paid, and unnecessary to be now considered)

. . . . . .

"*Thirdly*. To secure the payment, after said debts, etc., mentioned, are paid, two notes, ... (Since paid.)

"*Fourthly*. To secure the payment, after said debts, etc., mentioned, are paid, of all the debts of the house of Taylor, Shelby & Co., created since the 14th day of July, 1857 (fourteenth day of July), for which said party may be liable, it being the express intent of this indenture not to create any liability, except as they may now legally exist herein. . . . . .

After all the debts herein specifically provided for are paid, and all other debts due by the said party of the first part, the said party of the second part is hereby empowered to divide said lots and lands, herein conveyed, and execute all proper conveyances and other instruments of writing necessary to carry the same into effect, and, in said division, is to be only held responsible for the use of his proper judgment and discretion. He is also fully authorized and empowered to control, manage, sell, convey, and otherwise dispose of said premises, at any time, in any manner, and upon any terms he may deem reasonable and proper, at either public or private sale; the said party

hereby fully invests said trustee with all the power he himself possesses, for the purpose of selling, conveying, and disposing of said property, for the payment of debts herein set forth. He reserves the power of appointing, by will or deed, a new trustee, in the event of the death, resignation, or failure to act of the said trustee herein appointed and the said trustee so appointed, with all the powers herein granted to the said original trustee.

"The said party of the second part hereby reserves the right of declining the trust herein created, at any time, by deed duly acknowledged and proven; and he doth hereby signify his acceptance of his trust, and doth hereby covenant and agree to and with the said party of the first part, faithfully to discharge and execute the same according to the true intent and meaning of these presents."

The bill in this case (Record, 1), was filed in the Circuit Court of the United States for the District of Kentucky, on August 4, 1871, by C. W. Purcell, a banker, of Richmond, Virginia, doing business under the name of C. W. Purcell & Co., the Farmers' Bank of Virginia by David J. Sanders, receiver, and W. B. Isaacs & Co., also bankers, of Richmond, Virginia, against J. Warren Grigsby and others, for the benefit of themselves and such other creditors under said deed of trust as might appear, and bear their proportion of the expense of the suit. It avers the creation of the trust above described, and attaches the deed of trust by way of exhibit, and states that the debts of the fourth class are:

"all the debts of the house of Taylor, Shelby & Co. created since the 14th day of July, 1857," etc.,

The bill proceeds to describe three bills of ex-

change drawn by that firm on New York City, of which the drawers' liability was duly fixed by protest, demand, and notice, all drawn September 5, 1857: one for $7,650.04, in favor of C. W. Purcell & Co., payable on the 29th of the same month; the others in favor of the Farmers' Bank of Virginia, one for $8,456.90, payable October 6, 1857, and the other for $7,000, payable October 14, 1857. Complainants acknowledge credits, to be applied rateably to said debts, of the sums of $2,156.10, and $7,500 as of February 20, 1859, and March 13, 1868, respectively. They set forth the appointment, by the Circuit Court of the United States, for the District of Virginia, in 1868, of David J. Sanders as receiver of the Farmers' Bank of Virginia, and the assignment by him on February 9, 1871, to the complainants, W. B. Isaacs & Co., of the said debt of Taylor, Shelby & Co. to the Farmers' Bank of Virginia.

They also aver the conversion of part of the trust property by the trustee into notes; that the notes have come into the possession of Grigsby and his co-defendants, Grinstead and Moore, respectively, who unlawfully and fraudulently detain them; that Pindell, the trustee, is dead (and by an amendment to the bill—Record, p. 11—that he died insolvent), and that the number of creditors interested is too great to be brought before the Court.

They pray discovery of the claims upon said trust fund; that the defendants be enjoined from collecting the notes held by them, part of its proceeds, and that these be assigned to a receiver to collect; that the creditors entitled be advertised for by a master, who shall report such

as are entitled to prove their debts under the deed of trust, and for general relief.

To this bill Grigsby demurred, but his demurrer was overruled (Record, 12). He then filed his plea (Record, 13), that on and before August 28, 1860, said C. W. Purcell & Co., complainants, were the holders of the bills of exchange sued on, and on that day entered into an agreement with Edmund H. Taylor and Isaac Shelby, the former partners of Grigsby, pursuant to which said Taylor and Shelby appeared in the Fayette Circuit Court, in the State of Kentucky, and confessed judgment in favor of said Purcell, on said bills of exchange, for the sums of $15,456.97, with interest from September 21, 1857, and $7,650.85, with interest from October 1, 1857,

"which said judgment was a merger and satisfaction of said bills of exchange."

To which plea a transcript of the record of said judgment was attached as an exhibit (Record, 14).

Thereupon this plea was adjudged insufficient (Record, 15), and Grigsby ruled to answer.

Grigsby answered (Record, 16), that he was only a nominal, and not a real or interested partner in the firm of Taylor, Shelby & Co., and that when the complainants purchased the bills of exchange they gave him no credit as partner; that Taylor and Shelby agreed to settle the debts and relieve respondent; that Purcell owned and had control of the bills, and Taylor and Shelby entered into an arrangement with him on August 4, 1860, by which they confessed judgment in his favor on the

bills, and secured the judgment by good and sufficient collaterals; that said judgment merged the complainants' causes of action; that the causes of action are barred by the statute of limitations, having accrued more than five years before the commencement of the suit; that Susan P. Grigsby, the wife of the respondent, had purchased all the *first*-class debt out of her own sole and separate estate, and that respondent, as her agent, had control of such *first*-class debt, which amounted to nearly $50,000. and to enable the trustee to pay the *second*-class creditors a larger dividend than if the *first*-class debt should be paid in full, and to procure respondents' release from the *fourth*-class debts, an arrangement was made whereby Pindell, the trustee, consented to unite in the sale of part of the premises embraced in the trust deed, and endeavor to procure respondent's release from said *fourth*-class debts, and respondent agreed that the note in the hands of his co-defendant, Grinstead, should be applied to the *fourth*-class creditors, except Chenault & Co.; that the note in the hands of his co-defendant, Moore, should be applied, as far as necessary, to the expenses of the trust and to Chenault & Co., and the remainder to *first*-class creditors, and that respondent should receive the remainder, and pay off and discharge the *first*-class debts, and if he should be released from paying the *fourth*-class debt, that respondent would call for nothing more than said balance and notes on account of the *first*-class debt. He avers that this was a beneficial arrangement to the *fourth*-class creditors, denies the allegation of fraud, and is willing to carry it out

if the *fourth*-class creditors concur; otherwise prays that the *first*-class creditors be paid in full.

Exceptions, (Record, 19, 23), filed by the complainants, were sustained to so much of this answer as—1. Averred that Grigsby was only a nominal partner; 2. That Taylor and Shelby undertook to relieve him from liability; 4. Lapse of time, as far as it was interposed as a defense to complainant's claim upon the trust fund; 5. Made discovery; and, 6. Asserted a claim on behalf of Mrs. Grigsby, or Grigsby as her agent, as creditor, by substitution or otherwise, under the deed of trust. An exception (No. 3) to the defence of merger by confession of judgment, is not shown by the record to have been passed upon by the Court.

Grigsby amended his answer (Record, 23), so as to aver that during the war, and while the bills sued on were the property of the Farmers' Bank of Virginia, his co-defendant, Taylor, tendered payment to its attorney, Kinkead, in the circulating notes of the bank. Grigsby also filed a cross-bill (Record, 20), again averring the confession of judgment in the Fayette Circuit Court, that it was in pursuance of an arrangement made by Taylor and Shelby for the purpose of releasing Grigsby from responsibility on the bills; that they also secured the judgment by assigning good collaterals in the shape of notes and acceptances of solvent parties; that he never was a real partner, but was only nominally connected with Taylor, Shelby & Co., by being held out as such to the people of Lexington, and that the parties to the bills never gave credit to him as a partner, and he prayed a discovery of

the collaterals so given, and the application of so much of them as had, or might have, by diligence, been collected, to the claim of complainants, and for general relief.

To this cross-bill complainants answered (Record, 26), that neither when nor after the judgment was confessed were any collaterals assigned to secure it; that the confessed judgment was intended as a

"solemn declaration of the amount then due by said Taylor, Shelby & Co. to said Purcell & Co. and said Farmers' Bank,"

and that the same is entitled to no credit, "except as is expressed on its face." They denied that Grigsby was never a real partner, and averred that on July 11, 1857, William Shouse retired from said firm, and on July 14, 1857, Grigsby became a member of it, and was so advertised in the Lexington Observer and Reporter from July 18 to December 30, 1857, and they averred that Grigsby's name appeared on their bills of exchange as partner, having been written over the name of Shouse, and that they gave as much faith and credit to him as to the other partners,

"so far as they are able to remember after so great a lapse of time."

The complainants took their bill for confessed as to the matters embraced in the sustained exceptions, and filed their replication to the residue of Grigsby's answer and amended answer (Record, 28).

A receiver was appointed (Record, 16); the notes were surrendered to him; he collected, in all, $32,470.40 (Record, 130), and holds, in addition to divers valueless judgments, land to the nominal value of $27,000.

The cause was referred to the master (Record, 29), to take an account of the sums due to the several creditors under the deed of trust, and to that end to advertise for creditors to prove their debts, such persons to be required to contribute to the costs of this suit in the proportions settled by the master; also to report a reasonable fee for complainant's counsel.

Six claims were presented to the master by petitions and proofs, viz: Those of Mrs. Susan P. Grigsby, of the complainants, of R. Apperson, jun., of W. H. Thomas, of the heirs of William Shouse, and of Moore and Caulfield. Of these, the claim of the complainants, as made in their bill, with the deduction of two additional credits for $500 and $1,000, was sustained by the master as a debt of the *fourth* class, amounting, July 14, 1874, to $29,760.78, and exceptions by Apperson to its allowance, on the ground of lapse of time, were overruled (Record, 42–45, 122, 123).

Apperson's claim was found by the master, and sustained by the Court, as a *fourth*-class debt, to the amount, July 14, 1874, of $9,827.66.

Thomas' claim was for money deposited with Taylor, Shelby & Co., before July 14, 1857, and while Shouse was a partner, and was allowed by the master (Record, 45–48,, but upon exceptions filed by complainants and Grigsby, was disallowed and rejected by the Court (Record, 122, 123). Thomas prayed and was allowed an appeal, May 6, 1875, but has never perfected the same.

The claim of the heirs of William Shouse was for moneys paid by his estate upon a judgment recovered for

cash deposited with Taylor, Shelby & Co. while Shouse was, and before Grigsby became, a partner in the house; and the deposit continued after Grigsby's connection with the firm. This claim the complainants controverted on the ground that, as between himself and William Shouse, Grigsby never became a partner of the firm of Taylor, Shelby & Co., and it appearing that the firm was insolvent when Shouse retired, and that there was no agreement between Shouse and Grigsby relative to the change in the partnership, but that they were and continued to be strangers to each other, the master rejected the claim, and it was prosecuted no further (Record, 48, 49).

Moore & Caulfield's claim is for $500 fees for services rendered to the trust fund; was allowed by the master, and retained for further consideration by the Court (Record, 51, 128).

Mrs. Grigsby filed her petition (called affidavit and claim), asserting that she had paid and satisfied all the *first*-class claims out of her own separate estate; that some of them were assigned to her; that all were paid at her husband's instance and request, and that she is entitled to be substituted to the rights of the original creditors and holders of said debts, and she claimed reimbursement out of the trust fund of the sums so paid, as preferred claims, less $5,000 recovered and received (except $250 paid for fees for its recovery), by her October 20, 1859. She averred that the title to her estate, real and personal, was held for her separate use by Thomas H. Shelby until his death, when she was empowered, in accordance with the

laws of Kentucky, to act as a *feme sole*, and she, therefore, claimed the right to assert her claims in her own name and right, and to collect and receive the same, and prayed for general relief.

The master allowed all the claims, of which it appeared that specific assignments had been made to her, including a sum described in the deed of trust as due to her trustee, but rejected and disallowed all (being those of which we have copied the descriptions in the deed of trust, p. 3 *ante*) of which she was unable to present assignments. (Record, 34–42.) He found that the sum of $22,049.66 was due her in full, including interest to July 14, 1874. Exceptions filed to this allowance, by the complainants, were overruled, and this sum has been paid to her. (Record, 122, 130–132.)

Mrs. Grigsby excepted (Record, 121) to the refusal to allow the claims of which she had not taken specific assignments as evidences of transfers, but the Court overruled her exceptions, and ordered distribution according to the master's report. (Record, 127, 128.) She filed a petition for rehearing, which was overruled, whereupon she and her husband prayed an appeal, which was granted and perfected, and is now for hearing. (Record, 129, 130.)

The testimony before the master was presented both by deposition and affidavit. It was upon the suggestion of counsel for the complainants that the master permitted the proofs of debt to be made by affidavit (Record, 31), although he afterwards unsuccessfully excepted to their use. (Record, 119, 123.) She produced a deed (Record

59), made April 5, 1851, by John Warren Grigsby, to Thomas H. Shelby, trustee for her, which recited an antenuptial agreement, made November 5, 1850, in contemplation of marriage between Grigsby and Susan P. Shelby, and, in pursuance thereof, conveyed to Thomas H. Shelby all her real or personal estate, acquired or to be acquired, for her sole use and benefit, with full power of disposition, at her request.

Mrs. Grigsby testified, by deposition taken by complainants (Record, 107), that at the time of her marriage she owned 1,237 or 1,239 acres of land, in Lincoln county, Kentucky; about fifty-nine or sixty negroes; a great deal of stock on the place; and ten or twelve thousand dollars in money; that she afterwards, upon the death of her mother, acquired other slaves and more money, and an interest in some town property, in Danville, Kentucky, subject to the life-estate of her stepfather, the Rev. Dr. Robert J. Breckenridge. That J. Warren Grigsby owned a farm near Lexington, Virginia, and twenty-seven or thirty negroes; that he acquired, by the investment of his and her means, in 1856 and 1857, a large amount of property in the West, since conveyed to a trustee (the trust in controversy, we suppose); that his occupation after their marriage was, generally, superintending his and her property, and dealing in real estate; that, during the war, she kept a bank account, but discontinued it after the war, in 1866, and has attended to no business since then, and adds:

"Mr. Grigsby has attended to my business since then, about which I have always known something. Mr. Grigsby has generally

talked over business matters with me, but I have no accurate recollection in regard to all my business transactions since 1856. Mr. Grigsby has always been authorized by me, in the most unlimited manner, to use my means in the payment of his debts, so far as he might deem it right, necessary, or proper to do so."

And upon cross-examination by her own counsel, she said that while she was engaged in paying off her husband's debts, she talked with her counsel, Hon. Joshua F. Bell; that he assured her that she would be

"entitled to assert the debts against the property conveyed in trust by Mr. Grigsby to pay them;"

that she had the understanding with Mr. Grigsby, and the debts were always paid by her on that understanding; that she would be entitled to be repaid, or be considered the owner of them, and entitled to their transfer. She adds:

"After the war was over, a good many persons in our country, in embarrassed circumstances, took the benefit of the bankrupt law. Mr. Grigsby was altogether averse to doing so, and I concurred with him in this. I told him to use everything I had, rather than to take the benefit of the bankrupt law, and also to endeavor to save his property in the West. Ever since our marriage, I had authorized Mr. Grigsby to manage my business, and after the war I gave him the most unlimited authority to use my means in paying his debts, *but always on the understanding, and with the assurance, that I was to be, and would be, reimbursed out of his property, which he had conveyed in trust.*

The re-examination is as follows:

"*Question* 1. Were not many of those sums paid in his absence from the State, and without his knowledge?

"*Answer.* Of course, they were, but he knew of those debts

before he left, and desired me to have them paid out of the stock and produce of the place.

"*Q.* 2. Did you not pay those debts, or many of them, in order that your husband's creditors might not suffer by him, and in order that you might save his honor?

"*A. Yes; but with the confident expectation of being reimbursed.*"

This testimony is entirely uncontradicted, and is sustained by the affidavit of John W. Shelby (Record, 58), that

"he was the surety on the note referred to in the affidavit of Solon Craig, and as such was interested in seeing the same paid, after his principal had executed the deed of trust to Pindell, *and knows that Mrs. Susan P. Grigsby agreed to accept the security of the trust deed, and pay the same to Craig, and did pay the same in full thereafter out of the proceeds of the sale of stock, which sale was made for her by this affiant.*"

The claims in dispute, included in the *first* class, thus paid out of Mrs. Grigsby's separate estate, are four in number, and, as to their payment, proof has been given as follows:

1. The acceptance held by the Agricultural Deposit Bank, amounting to $5,000. Original not produced.

Grigsby testifies, by affidavit, (Record, 55), that, as her agent, he paid it with money furnished from her separate estate.

James, president of the bank, testifies, by affidavit, (Record, 55), that the acceptance has been fully paid and satisfied.

Mrs. Grigsby, by deposition, testifies (Record, 108), upon examination by complainant's counsel:

"*Q.* 9. When was the acceptance for $5,000, which was held by the Agricultural Deposit Bank of Lexington, paid?

"*A.* I paid that immediately after the close of the war; it amounted to upwards of $6,000 then, with the interest.

"*Q.* 10. Give as nearly as possible the exact amount of that payment, and by whom it was made.

"*A.* I think it was $6,000, or a little upwards. I had previously taken up the original paper with my own paper, thereby releasing Colonel Hart and Mr. Shelby, the indorsers. I had promised to pay the debt, having carried on a correspondence with Mr. James, who owned the debt, in regard to it, and after Mr. Grigsby's return Mr. James wrote to him in regard to the debt, and it was then paid with my means. It is my recollection that two payments were made on that debt; that first the interest was paid, perhaps, and afterwards the payment of $6,000 or upwards was made just after the war."

2. The acceptance held by the Harrodsburgh branch of the Commercial Bank of Kentucky, amounting to $2,500. Original not produced.

Grigsby, by affidavit (Record, 56), says he paid it as agent of his wife, and with money furnished by her from her separate estate.

McBrayer, president of the bank, says, by affidavit, Record, 55), that its books show that no portion of the acceptance remains due and unpaid.

Mrs. Grigsby, by deposition (Record, 108), testifies as follows:

"*Q.* 11. When and by whom was the acceptance, which was held by the branch of the Commercial Bank at Harrodsburgh, paid? State also what amount was paid.

"*A.* That was paid, I think, in the winter of 1863–4. I think it was $3,000 that was paid.

"*Q.* 12. Why did you pay this debt?

"*A.* There were several respectable parties, who notified me through my friends that Mr. Grigsby was their debtor, and they asked me to pay them their debts, which, I promised to do, if they would give me time. The Commercial Bank was one of those debts. I think, I paid a number of such debts."

3. The note to Walter.

This note was produced, and with the indorsement of payment, is as follows (Record, 57):

"*January* 1, 1857.

"Twelve months after date, I promise to pay N. H. Walter or order, eight hundred and thirty-seven ($837) dollars, with interest from date. J. WARREN GRIGSBY.

(Indorsed on back, as follows:)

"Received payment in full from Mrs. Susan P. Grigsby.

"N. H. WALTER."

Walter testifies, by affidavit, that this indorsement was made by him,

"and that said note, as shown by his said indorsement, was paid by Mrs. Susan P. Grigsby."

4. The items described in the deed of trust as

"an amount of about thirty-five hundred dollars due by said party in small sums, to various persons in various places in Kentucky, principally current accounts of the year."

In Mrs. Grigsby petition, she avers that she

"has paid off and satisfied out of her separate estate large amounts of debts due and owing by said J. Warren Grigsby at the time and date of the execution and delivery of said deed of trust, and among the *first* class of debts to be paid, and which are and were intended to be embraced by the general clause in said deed as follows: (quoting the above passage). Said debts paid by affiant, as aforesaid,

and embraced by said clause of said deed are as follows: (Here follow 45 items of various sums, from $2 up to $491.25, amounting in all to $2,440.31.) The foregoing claims were paid prior to the 27th day of March, 1868, but that is about the date of the last payment, and she asks and is willing to take interest from said date. She also paid to Solon Craig a debt embraced and secured by said clause of said deed of trust for $1,830, upon which interest ran from February 1, 1857, and was paid in full by affiant, with its interest; also, a debt to J. P. Fisher for $700, with interest from 10th day of December, 1857, which was embraced and secured by the same clause, and was paid and satisfied in full by affiant. All the above debts and the amounts, as stated, were paid by affiant as before alleged, out of her separate estate, and which sums, with interest, she claims from the proceeds of said trust property."

Grigsby, by affidavit (Record, 58), testifies that, as her agent, and with money furnished by her from her separate estate, he paid these debts (referring to the 45 items).

Solon Craig, by affidavit, says, that on December 10, 1857, Grigsby was indebted to him on a note, with John W. Shelby as security, dated February 1, 1857, for $1,830, including interest from date, and that it has been fully paid, but he does not know by whom.

John W. Shelby, by affidavit, testifies as already stated. (p. 15, *ante*.)

J. P. Fisher, by affidavit, testifies, that he is a resident of Danville, Kentucky, that on December 10, 1857, Grigsby was indebted to him in open account in the sum of $700, and that the same has been paid to him by Mrs. Grigsby.

Mrs. Grigsby, in her deposition (Record, 109), testifies, in answer to a question by counsel for complainants, thus:

"*Q.* 18. How do you know that the miscellaneous payments referred to in your affidavit, and amounting in the aggregate to $3,500, were made? State, if you know, when and how these various sums were paid.

"*A.* . . . A great many of the debts named in the list were presented to and paid by me during the war, and the others were paid after the war. I recognize all the names in the list."

With regard to the tender in Farmers' Bank notes, Taylor, by deposition, in answer to the fifth question in chief, testifies (Record, 102) that he tendered to George B. Kinkead, of Lexington, complainants' attorney,

"notes of the Farmers' Bank of Virginia to an amount I conceived to be in full of the amount due the plaintiffs. Said attorney was authorized to collect the debts. He neither accepted nor refused positively the tender, but conferred with Mr. W. H. McFarland, president of Farmers' Bank of Virginia, who, I afterwards understood from the attorney, declined it. This was, I think, in the fall of 1864, and I paid for said notes 95c in United States treasury notes."

And again, in answer to the *eighth* cross-interrogatory (Record, 103), he says:

"I do not recollect the amount tendered plaintiff's attorney, nor can I after investigation ascertain it. The date of the tender I believe to have been in the fall of 1864. . . . I produced the notes of the Farmers' Bank of Virginia, and tendered same to plaintiff's attorney, and, at his request, placed same in Branch Bank of Lexington, where I believe it remained until declined by the Farmers'."

Kinkead (Record, 116), by deposition, testifies that he

"never knew distinctly how the bank and Purcell stood to each other in their several claims. I thought their claims, in some way I did not know, were united."

And again (Record, 118):

"After the war closed, Mr. Taylor proposed to me to accept the notes of the Farmers' Bank in discharge of the debt. I declined doing it, and wrote to Mr. McFarland his proposition. I believe nothing ever came of this."

Exceptions were taken (Record, 118) and sustained (Record, 123) to Taylor's answers aforesaid to the fifth question and eighth cross-interrogatory, for irrelevancy.

The master reported the sum of three thousand dollars as the proper fee to be allowed to complainants' counsel. To this allowance, General and Mrs. Grigsby, Apperson, and Thomas severally excepted. (Record, 121-123.) The Court reduced this to one thousand dollars, and ordered

"it to be paid ratably by all the parties, irrespective of the classes in which they stand under the deed of trust."

Of this method of distributing the charge for services rendered adversely to her interests, the effect of which was to compel her to pay $704.30 to counsel for attacking her, as well as her own counsel for defence, Mrs. Grigsby made complaint in her petition for rehearing (Record, 129), but the same was overruled by the Court (Record, 130).

ASSIGNMENT OF ERRORS.

The Circuit Court erred:

1. In overruling Grigsby's demurrer to the bill.

2. In adjudging Grigsby's plea to be insufficient.

3. In sustaining the exceptions, and each of them, to Grigsby's answer.

4. In overruling the exceptions filed by General and Mrs. Grigsby respectively to the report of the master.

5. In sustaining exceptions to the testimony of Taylor.

6. In sustaining the master's report.

7. In making distribution to the complainants.

8. In making distribution to Apperson.

9. In refusing to distribute to Mrs. Grigsby on account of the several claims paid by her which the master had rejected.

10. In overruling the petition for rehearing filed by Mrs. Grigsby.

11. In charging any part of the fee allowed complainants' counsel upon the portion of the trust fund distributed to her.

ARGUMENT.

I.

Mrs. Grigsby is entitled, by subrogation, to be substituted to the rights and interests in the trust fund, of every creditor whose claim was paid with her money.

The Court below seem to have treated her as a mere volunteer, or as having designed to make a gift to her husband of the moneys used in these payments, or as having intended to extinguish the claims.

Neither of these positions is tenable, or in any way sustained by the facts. On the contrary, while she consented to the use of her separate estate in the payment of these claims, it was with the distinct understanding, between her and her husband, that she should be reimbursed out of the trust fund. She so says under oath, being called as a witness by the complainants. Her statement is reasonable and probable. She is contradicted by no one, and is corroborated by the testimony of John W. Shelby.

Such subrogation does no injustice to the other parties. They had no claim against her or upon her property. They were creditors of Taylor, Shelby & Co., without equity against her, holding junior liens upon the trust fund. By the laws both of Illinois and Kentucky, assignments with preferences are permitted.

Cross v. *Bryant*, 2 Scam. 36.

Howell v. *Edgar*, 3 Ib. 417.
Cooper v. *McClun*, 16 Ill. 435.
Gibson v. *Rees*, 50 Ib. 383.
Vernon v. *Morton*, 8 Dana, 257.

In the case at bar, Grigsby found himself a partner as to third persons, and thus liable for a large sum of money, in a firm which was already, without his knowledge, insolvent, when he allowed the use of his name for its aid. He very properly (just as the Bankrupt Law afterwards required) took the course of securing the payment, first, of his individual indebtedness out of his individual estate. The interests of the *second, third* and *fourth*-class, or firm, creditors, in the trust fund were, by the deed of trust, specifically subjected to the prior and superior lien of the *first*-class or individual debts. The claims in question were enumerated in the *first* class. To pay them now will not increase the burden upon the *fourth*-class creditors. Not to pay them will diminish the amount of liens prior to the *fourth* class, without any consideration whatever moving from the *fourth*-class creditors. *They* have not paid or contributed to pay these *first*-class claims. *Their* money did not extinguish these debts. If these be not extinguished, *their* claims will not be in a worse position than before. Nor did Grigsby's money, or any money he was entitled to, pay these claims. It was money settled to his wife's separate use, not earned by him, but inherited from her father and mother. This money was advanced to pay his individual debts (not the firm debts, which neither he nor she considered him morally bound

to pay), which were legally secured by a lien prior and superior to that of the firm debts—money advanced out of her separate estate, of which he could not legally control a dollar, not as a gift to him, but with the assurance that she should be reimbursed from the trust fund.

Not to pay her is, therefore, to violate the contract between her and her husband, upon the faith of which these debts were paid, and at her expense to benefit the *fourth*-class creditors, without any meritorious consideration or cause from them moving. To pay her is to leave their situation wholly unchanged. It will not subject them to further burdens, but will simply prevent their gaining an unjust advantage, to her loss, at her cost.

In the case of *Miller* v. *Rutland and Washington Railroad Co.*, 40 Vermont, 400, Bradley had advanced money and taken up certain coupons of the earlier mortgage bonds, upon an agreement with the Company that their lien should be preserved. The Court say (p. 408):

"But a court of equity will not convert a payment into a purchase, in favor of a party advancing the money, when there is a superior countervailing equity in another party. As Bradley took up these coupons on the faith of an agreement that he should have the benefit of the mortgage, he should be protected unless some superior equity forbids it. The corporation cannot object in the face of their agreement. *The third mortgage bondholders can not object, for these coupons are a part of the original mortgage debt under this prior mortgage.* If it appeared that Bradley represented to them, when they took their mortgage, that the coupons were paid, the case might be different. *The third mortgagees are in no worse condition if these coupons are allowed as now pre-*

sented, than if they still remained unpaid, attached to the bonds, neither are the first mortgagees, so far as appears."

To the same effect is *Haven* v. *Grand Junction Railroad and Depot Co.*, 109 Mass. 97.

Here, then, is the foundation for the equitable principle of subrogation, which arises, not out of contract, but is the result of the application of natural justice, *ex æquo et bono.*

Hodgson v. *Shaw*, 3 Myl. & Keene, 183.
Hays v. *Ward*, 4 Johns. Ch'y, 130.
Matthews v. *Aikin*, 1 Comst. 595.
Kyner v. *Kyner*, 6 Watts, 221.
Mosier's Appeal, 56 Penn. St. 76.

"Subrogation is founded on principles of equity and benevolence, and may be decreed where no contract or privity of any kind exists between the parties. Where one, not a mere volunteer, discharges the debt of another, he is entitled to all the remedies which the creditor possessed against the debtor." *Cottrell's Appeal*, 23 Penn. St. 294.

In *Robinson* v. *Leavitt*, 7 N. H. 100, Chief Justice Parker says:

"The true principle, I apprehend, is that where money due on a mortgage is paid, it shall operate as a discharge of the mortgage, or in the nature of an assignment of it, substituting him who pays in the place of the mortgagee, as may best serve the purposes of justice, and the just intent of the parties."

See also *Starr* v. *Ellis*, 6 Johns. Ch. 395.

That Mrs. Grigsby was not a mere volunteer, the master admits (Record, 36), but claims that the fact that she advanced these moneys at her husband's instance, could only create a demand against him personally, and not upon the trust fund.

Several considerations show that this is a quite inadequate statement of her rights. She is entitled to much more than a barren judgment against her husband.

The case has a threefold aspect, and may be considered with reference to Mrs. Grigsby's right of subrogation :

1. As shown by the relations of the parties, and their acts, irrespective of the purpose with which, or the agreement upon which, the money was paid.

2. By the intent with which the payments were made.

3. By the agreement and understanding upon which she advanced the money to make these payments.

First. We insist that, irrespective of the intent of the parties, or their expressed understanding, the facts proved establish the right of Mrs. Grigsby to the subrogation claimed.

The money that paid the debts was hers, not his ; not only was it derived from her separate property, but it was never given to him, and of it, without her consent, he could make no use. The master argues, from

her testimony, that between 1865 and 1871 she consulted Hon. Joshua F. Bell, and, upon his advice, took assignments of such claims as were purchased afterwards, and from this he deduces the previous purpose to pay and extinguish, by way of gift to her husband, the claims now in dispute, which were adjusted before that time. But no witness says that these claims were paid with money given by her, or that she ever intended to cancel them, or to make a gift of the money to General Grigsby. She testifies to the contrary. Grigsby swears that he paid them as her agent. John W. Shelby supports her. The more probable conclusion is that Mr. Bell advised her to be more prudent thereafter in preserving the evidences of her interests in these claims, and that for this reason only she afterwards required formal assignments.

There is no presumption that she gave her husband the money, or authorized its use except for her own benefit.

In *Keeney* v. *Good*, 21 Penn. St., at page 354, Chief Justice Black says:

"But by the act of April 11, 1848, a married woman may have property in her own right which shall not be subject to levy for her husband's debts. *Of such property, possession is no test of title.*"

See also *Gabrill* v. *Moyer*, 45 Penn. St. 530.

"Possession by a husband of property to which a trust in favor of his wife has attached, is the possession of the wife." *Robison* v. *Robison*, 44 Ala. 227.

"If the rights of a married woman, when authorized by law to own and dispose of her property free from the control of her husband, are to be protected at all, she cannot be deprived of them by

her husband, by any means short of those which would be required in the case of a stranger." *Deming* v. *Bailey*, 2 Robertson, 1, 4.

"Where the husband, as the agent of the wife, and by her direction, makes an exchange of property belonging to her, the property for which the exchange was made will also belong to the wife." *Pike* v. *Baker*, 53 Ill. 163.

See also *Adlard* v. *Adlard*, 65 Ill. 212.

In several well-considered cases, the Court of Appeals of Kentucky has established the proposition that the husband's possession of the wife's property does not raise a presumption of gift to him, and that if he invest her moneys and take the title in his own name, he will hold it as her trustee, and this, whether the moneys were derived, as here, from her separate estate or were her ordinary property, earned or inherited, or even given to her by him.

The fact, therefore, that a husband uses his wife's money to pay his debts, raises no presumption of payment. The legal effect of the transaction must be to transfer the rights of the creditor to her, by operation of an equity analogous to that upheld in cases of resulting trust. In the absence of evidence, the law will not attribute to his act, in using her money in the payment of his debts, the effect of depriving her of all claim, as if the money had been given to him, nor of converting her into a mere unsecured creditor for money had and received. As her trustee, he paid the debt, and in thus paying it, acquired its ownership for her. No other theory is consistent with justice, both to the creditor and to her. One who applies money held in trust to the payment of his own debts ought not to be considered merely a debtor

of the trust; but justice is only fulfilled by treating the securities held by the creditor as transferred in equity to the trust estate.

We are aware that Mr. Perry (Trusts, § 842) adopts and cites an *obiter dictum*, pronounced in 1829, to the contrary, in *Winder* v. *Diffenderfer*, 2 Bland, 198. With every disposition to treat Chancellor Bland's opinions with the highest respect, it seems to us that he reasoned upon a theory of subrogation much narrower than elsewhere adopted. In this case, Charles Rogers had charged the payment of his debts, in default of sufficient personal property, on the real estate devised in trust for his daughters, Sarah Bailey, Ann Martin, and Mary Lee, to the exclusion of that devised to his daughter, Catherine Rogers (p. 170). The trustee, Vincent, paid these debts, in part, out of the rents and profits of the lands devised for the benefit of Catherine Rogers. Her representatives claimed to take the place of the creditors whose debts had been thus paid, as against the portions given in trust for the other heirs. The Chancellor held (p. 197), that by a judgment in another case, conclusive upon her, these payments had been adjudged truly and correctly made, so that

> "She, or any one claiming under her, cannot be permitted, in any way, to question the correctness of the manner in which the debts of Charles Rogers, deceased, were paid, which had been so distinctly noticed, considered, and confirmed by those judgments of the Court."

Having thus ascertained that the matter in controversy was *res adjudicata*, the Chancellor proceeds to the

unnecessary discussion of the question of substitution, and reasons upon the theory (p. 201) that

"the doctrine of substitution embraces only those cases where there is a principal debtor and a surety by express or implied contract: or where for the benefit of commerce a man is allowed officially to place himself in the condition of a surety; or where he has by mistake, as in the case of an executor, made payment as if he had stood in that situation."

That this confines the application of the equitable principles of subrogation within limits much narrower than elsewhere established, is obvious at once. The very state of facts presented to Chancellor Bland is regarded as clearly entitling parties to the aid of the Chancellor, upon the principle of subrogation. 1 Story's Eq. Jurisp. § 565.

In *Mollan* v. *Griffith*, 3 Paige, 402, Chancellor Walworth holds (and sustains his position by authority as well as principle) that:

"If the personal estate of a deceased debtor is not sufficient to pay his debts and legacies, and his executor exhausts the personal estate in the payment of creditors, whose debts are chargeable both on the real and personal estate, a legatee, as between himself and the heir at law of the decedent, is entitled to stand in the place of such creditors *pro tanto*, and to recover the amount of his legacy, or so much thereof as the personal estate would have paid, out of the real estate descended to the heir."

The cases decided by the Court of Appeals of Kentucky, that a husband is regarded in equity as trustee of real or personal property conveyed to his wife's separate use, of which the *legal title* may be vested in him, are:

Long v. *White*, 5 J. J. Marsh. 226.
Bridges v. *Wood*, 4 Dana, 610.
Griffith's Adm'r v. *Griffith*, 5 B. Mon. 113, 118.
Beard's Ex'r v. *Basye*, 7 Ib. 133, 145.

"A married woman may, with money coming to her in her own right, before the husband gets it into his possession, with the husband's consent, vest it in property to be held to her separate use. And though the legal title may vest in the husband, he will hold it as a trustee, to the separate use of the wife." *McClanahan* v. *Beasley*, 17 B. Mon. 111.

See also—

Maraman v. *Maraman*, 4 Metc. Ky. 84.
Bryant's Adm'r v. *Bryant*, 3 Bush, 155.

In *Miller* v. *Edwards*, 7 Bush, 397, Chief Justice Robertson says:

"The furniture, though ostensibly in the husband's possession, and therefore technically his property, was nevertheless, and yet is beneficially, hers. No written memorial or registration in such a case is required by law. And though a purchaser from the husband without notice might have been entitled to hold, yet a mere creditor cannot prevail against the wife's clear equity. This is virtually so settled by the case of *McClanahan* v. *Beasley*, 17 B. Mon. 111.

"We conclude, therefore, that Mrs. Yeaman has a separate estate in the property, and although the character of the property is changed from personalty to realty, the same consequences attach to it, and it cannot be alienated unless it be to reinvest for the separate use of the wife." *Hathaway* v. *Yeaman*, 8 Bush, 391.

See also—

Young v. *Smith*, 9 Bush, 425.
Penn v. *Young*, 10 Bush, 628.

"For many purposes, equity treats husband and wife as distinct persons, capable of contracting with each other, and their contracts will sometimes be enforced even against the creditors of the husband.

"A married woman is incapable of receiving and holding the legal title to personal property; but if the property be expressed to be for her separate use, and the gift or sale be to her without the intervention of a trustee, the legal title will vest in the husband, who will be converted into a trustee for the wife, and the beneficial use will vest in her. But if the sale or gift be by the husband directly to the wife, the legal title will remain in him, and the beneficial use will vest in her as her separate estate and the husband will be treated as her trustee." *Campbell* v. *Galbreath*, 12 Bush, 459.

"If personalty be conveyed to a married woman for her separate use, the law intercepts the title intended to be invested in her, and vests it in her husband; but the chancellor, intent on carrying into effect the intention of the grantor, seizes upon the conscience of the husband, and compels him to hold the property for the benefit of the wife, by converting him into a trustee for her.

"If the husband sells or gives personalty to his wife—she being incapable of taking from him—the law denies effect to his intention; but equity will interpose, and recognizing the rule of law that the husband is still the legal owner of the property, will, in order to give some effect to the transaction, treat him as holding as her trustee, and compel him to hold for her use." *Thomas* v. *Harkness*, 13 Bush, 23.

"A husband can waive his right to his wife's money—money levised and earned by her—and allow her to purchase land with it in her own name.

"Having allowed his wife to purchase land with her money, the land became hers, and the husband had no right, without her consent, to take the conveyance to himself; and between them he held the title in trust for her, and as long as he held it, he might have been compelled to surrender it to her; and one who procured

the title from him, by fraud upon her, would hold subject to the same equity." *Pribble* v. *Hall*, 13 Bush, 61.

In *Miller* v. *Edwards*, 7 Bush. 394, already referred to, Chief Justice Robertson (p. 397), speaking of a similar transaction, says:

"Even without any explicit stipulation, an available trust resulted by implication, unaffected by the statute of frauds or of conveyances. . . . There is no ground to presume that the husband ever intended to convert the wife's estate or its proceeds to his own use, or that any act of hers sanctioned such conversion as between themselves; therefore, all that remains is equitably as much hers as ever it was."

The same principle is administered in the English Courts of Equity.

In *Tate* v. *Austin*, 1 Peere Williams, 264, 266, it is said, with reference to the case of *Earl of Huntington* v. *The Countess of Huntington*, 2 Vernon, 437:

"And though it was decreed by Lord Keeper Wright, that the heir of the wife was not entitled to have the personal estate of the husband so applied (viz. to relieve her estate from a mortgage given to secure his debt), yet, upon an appeal to the House of Lords, that decree was reversed, and the mortgage decreed to be paid out of the husband's personal assets, which Lord Cowper thought very just. *Quod nota, it being insisted upon that it was a gift of so much money from the wife to the husband, and, therefore, not to be refunded.*"

In *Parteriche* v. *Powlet*, 2 Atkyns, 384, Lord Hardwicke says:

"The wife, too, in this case had a separate estate by virtue of the marriage settlement; the husband had an incumbrance upon

his estate; the wife advanced money to pay it off, and the receipt from the mortgagee was delivered to her. The question is, whether this was a bounty or a loan only from the wife, for the receipt is not produced. If it is by way of loan, she, having a separate estate, must be considered as a distinct person, *and is equally entitled to stand in the place of a mortgagee as a stranger;* and it is like this case. Suppose a husband has a mortgage upon his estate, and a wife joins with him in charging her own, if she survives him, though her estate is liable to the mortgagee, yet in this Court her estate shall be looked upon only as a pledge, and she is entitled to stand in the place of the mortgagee, and to be satisfied out of her husband's estate."

It is a well-established principle in equity that a wife, whose estate is incumbered for the debt of her husband, though she may not properly, in the strict use of language, be described as a surety, nevertheless stands in the situation of a surety, and has the rights belonging to that relation.

Pocock v. *Lee*, 2 Vernon, 604.

Earl of Huntington v. *Countess of Huntington*, 2 Ib. 437.

Tate v *Austin*, 1 Peere Williams, 264.

Parteriche v. *Powlet*, 2 Atkyns, 383.

Lacam v. *Mertins*, 1 Vesey sen. 312.

Gleaves v. *Paine*, 1 DeG. Jones & Smith, 87.

In this case Lord Westbury (p. 95) says:

"The estate of the wife being mortgaged in the manner I have described, for the debt of the husband, the wife unquestionably assumes, in the eye of a court of equity, the character of a surety for

the husband. Properly speaking, she is not a surety, but she is so called by analogy."

To the same effect are many American cases.

Kinley v. *Hill*, 4 W. & S. 426.

In *Miner* v. *Graham*, 24 Penn. St. 495, Lewis, C. J., says that under such circumstances she

"stands as a surety."

Hawley v. *Bradford*, 9 Paige, 200.

Gahn v. *Niemcewicz's Exr's*, 3 Paige, 614.

(S. C.), 11 Wend. 312.

Fitch v *Cotheal*, 2 Sandf. Chy. 29.

Loomer v. *Wheelwright*, 3 Ib. 135.

Vartie v. *Underwood*, 18 Barb. 561.

In this case it was held that

"The wife being a surety, the law presumes that the principal not only agreed to pay the debt, but to indemnify her against her loss."

No one will deny that when she stands in the situation of a surety she is entitled to the rights of a surety, and, among the rest, to be subrogated to any securities held by the creditor. In principle there can be no difference between her equitable character, when she pays her husband's debt, without previous liability to the creditor, and when, having mortgaged her separate estate for his accommodation, she afterwards discharges it. If, in the latter case, she

"assumes, in the eye of a court of equity, the character of a surety,"

so also does she in the former. One is payment for his accommodation by one, the other by two movements.

The substance is the same. The essential nature, the real character, of both transactions, is the same. Each ends in the discharge of his debt with her money, and such was the purpose of each from the beginning. Lord Hardwicke, in the passage we have quoted from *Parteriche* v. *Powlet*, uses the instance of a mortgage previously given by her to secure his debt, as an apt illustration to prove that she is his surety when she pays it at once, and, therefore, held her

"equally entitled to stand in the place of a mortgagee as a stranger."

The case of *Hobson* v. *Hobson's Ex'r*, 8 Bush. 665, may, perhaps, be cited against the view we present, but it is not relevant. The question there arose upon the statute of limitations of Kentucky, which discharges, after seven years from the time the cause of action accrued,

"a surety in any obligation or contract."

It was held that a wife mortgaging her property to secure the debt of her husband was not within these words. We are not to understand from this that the Court of Appeals of Kentucky refuses to adopt the views everywhere else prevailing, that she, occupying the position of a surety, is dischsrged by indulgence to the creditor, is entitled, upon payment, to be subrogated to the rights of the creditor, but merely that she is not

"a surety *in any obligation or contract*."

as, of course, she could only be by becoming a party to the obligation or contract of indebtedness. Reference to the opinion will show that it extends no further than this.

So, also, the relation of trust and confidence, the fiduciary relation, subsisting between husband and wife, prevents these payments being treated as gifts, and requires them to be upheld as transfers.

A guardian advanced money to his ward, which was secured to the latter by recognizance. Held, that he was entitled in equity to the security of the recognizance. *Kelchner* v. *Forney*, 29 Penn. St. 47.

Even negligence of the trustee will not prevent the subrogation. Thus, where a guardian had neglected to collect the ward's moneys in his predecessor's hands, and was, therefore, compelled to account for them, it was held:

"that said guardian is, by implication of law, subrogated to the rights of the ward; that the debt by said payment is transferred to him, and he may recover it, in any proper form of proceeding, of the former guardian or his sureties upon their bond." *Smith* v. *Alexander*, 4 Sneed, 482.

It would be strange, indeed—a serious reproach to equity jurisprudence—were a wife, anxious to preserve her husband's credit, and therefore paying his debts, denied the right conceded to a careless trustee, forced to make good a loss occasioned to his *cestui que trust* by his negligence. Why should a judgment, in trespass, trover, or replevin, have the effect to transfer title to the goods to the wrongdoer, if payment in a case like this does not inure to the benefit of the innocent wife?

A striking illustration of the rule that money paid and intended to effect the extinguishment of a debt, will be

held to operate in equity as the consideration of a transfer by operation of law, when justice requires it, even though there be no intent and no agreement to keep the claim alive, is furnished by several cases in California. It seems that in that State the wife's signature is necessary to a valid mortgage of a homestead. An unmarried man gave mortgages, and then married. He afterwards gave new mortgages, not executed by his wife, to persons who paid off the first mortgages and caused them to be canceled. It was held:

"That in equity the transaction is an assignment of the first mortgages in consideration of the money advanced by the second mortgagees; not the creation of a new incumbrance, but changing the form of the old." *Swift* v. *Kraemer*, 13 Cal. 526.

To the same effect are:

Dillon v. *Byrne*, 5 Cal. 455.
Birrell v. *Schie*, 9 Cal. 106.
Carr v. *Caldwell*, 10 Cal. 380.

Secondly. As to the *intent* with which the payments were made. It is very clearly shown that when Mrs. Grigsby consented to the use of her money by her husband, in the payment of his debts, it was with the purpose and understanding that the debts were to be kept alive, so as to reimburse her out of the trust fund. This is enough to require the subrogation for which we contend. He could not, in making payment as her agent, lawfully have any other intent.

In *Dodge* v. *Freedman's Savings and Trust Company*, 93 U. S. 379:

"Where a note, deposited in bank for collection by its owner, was paid by a person not a party thereto, with the intention of having it remain as an existing security, and the money so paid was received by the owner of the note: *Held*, that such person thereby became the purchaser of the note, the negotiability of which remains, after as before maturity, subject to the equities between the parties."

Besides the cases cited in this opinion of this Court, other authorities enforce and sustain the proposition, applying it to cases like this.

Thus, in *Starr* v. *Ellis*, 6 Johns. Ch. 395, Chancellor Kent says:

"A court of equity will keep an incumbrance alive, or consider it extinguished, as will best serve the purposes of justice, and the actual and just *intention* of the party."

And he quotes (p. 396) from the opinion of Sir William Grant, in *Forbes* v. *Moffatt*, 18 Ves. 384:

"A court of equity will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it where at law it would be merged. *The question is upon the intention, real or personal, of the persons in whom the interests are united.*"

In *Brown* v. *Lapham*, 3 Cushing, 551, Chief Justice Shaw (p. 554) says of a case where the question was whether a mortgage had been extinguished so as to let in the wife's dower:

"Whether a given transaction shall be held, in legal effect, to operate as a payment and discharge, which extinguishes the mort-

gage, or as an assignment which preserves and keeps it on foot, does not so much depend upon the form of words used as upon the relations subsisting between the parties advancing the money, and the party executing the transfer or release, and their relative duties. *Gibson* v. *Cohore*, 3 Pick. 475.

"If the money is advanced by one whose duty it is, by contract or otherwise, to pay and cancel the mortgage, and relieve the mortgaged premises of the lien—a duty, in the proper performance of which others have an interest—it shall be held to be a release and not an assignment, although in form it purports to be an assignment.

"When no such controlling obligation or duty exists, such an assignment shall be held to constitute an extinguishment, *according to the intent of the parties; and their respective interests in the subject will have a strong bearing upon the question of such intent.*"

See also—

Graves v. *Mumford*, 26 Barb. 94.
Carter v. *Jones*, 5 Iredell Eq. 196.
Gernon v. *McLean*, 23 La. An. 84.
Lucas v. *Wilkinson*, 1 Hurlst. & Nor. 418.

This rule is analogous to that which permits a stranger to pay and hold an acceptance *supra protest*. In that case, however, the consent of the debtor need not be shown, while here it is proved. Mr. Chitty says (Chitty on Bills, 509):

"Although, with respect to other debts, a stranger who has an interest in them, does not by paying them entitle himself to the rights of a creditor, unless he have the consent of the debtor to such payment, yet, with regard to a bill of exchange, a stranger who

pays it *supra protest*, for the honor of the bill, or generally, becomes an indorsee, and acquires all the same rights, and is entitled to all the same remedies, as the holder had whom he paid, although no formal indorsement or transfer of the bill be made to him; and such payment *supra protest* does not, like a simple payment by the original drawee, operate as a satisfaction of the bill, but itself transfers the holder's rights to the party paying, unless the party paying, by his own act, limits and narrows his right."

See also Dixon on Subrogation, 142.

It is noticeable that two of the claims under discussion (those of the Agricultural Deposit Bank, for $5,000, and of the Commercial Bank of Kentucky, for $2,500) were upon bills of exchange, and that the payment of these, *supra protest*, by Mrs. Grigsby, entitled her, upon the principle of commercial law just cited, without resort to the equitable doctrine of subrogation, to the relief she now seeks.

Thirdly. Payment to a creditor, upon an agreement with the debtor that the security shall be transferred to the party so paying, and not be extinguished, in equity works such transfer, even although the creditor receiving the money is entirely ignorant of such arrangement. If, as already shown, the mere *intent* of the payer to keep the claim alive will have this effect, *a fortiori* will the same result follow where there is, as in this case, an agreement with the debtor to that effect.

Mrs. Grigsby (Record, 110) testifies:

"I had that understanding with Mr. Grigsby, and the debts

were always paid by me on that understanding. . . . After the war, I gave him the most unlimited authority to use my means in paying his debts, but always on the understanding, and with the assurance, that I was to be, and would be, reimbursed out of his property, which he had conveyed in trust."

In *Miller* v. *Edwards*, 7 Bush. 394, the wife had inherited lands in Henry county, Kentucky, together with money to the amount of twenty-five hundred dollars. She united with her husband in selling the lands, and, with their proceeds added to the twenty-five hundred dollars, in purchasing a more desirable farm in Shelby county,

"on the express condition that the title should be secured to her separate use."

This was not done, but, on the contrary, the Shelby county lands were conveyed to the husband. She afterwards discovered the apparent condition of the title, and then concurred in the sale of the Shelby county lands, and the reinvestment of the proceeds, in part, in the purchase of a smaller place,

"to be secured to her as the other was to have been."

Again the title of the purchased property was made to the husband. Discovering this error, she concurred in the sale of the land, and the appropriation of two thousand dollars of the proceeds to the payment of her husband's debts, on the express condition that the notes for the residue should be made payable to him for her separate use, and deposited with a stranger to keep for her. Which being done, the notes, together with furniture purchased

by her husband with money given her for that purpose by her mother, were attached as his property by his creditors.

It was held that the property was not liable for his debts.

Chief Justice Robertson (p. 397) says:

"Such a contract as that made with her husband before her land was sold, is valid and enforceable, as between the parties to it, as a prudent mode of preserving her estate against his improvidence or capricious power."

Then follows the passage already quoted by us from this opinion (*ante*, p. 33).

The fact that Grigsby used his wife's money to extinguish (as far as the creditor was concerned) his own debt, instead of making a formal purchase, and taking an assignment, matters not. Had he taken title in his own name, to property bought with money entrusted to him by her to make a purchase in her name, equity would hold him as her trustee. By parity of reasoning, under circumstances like these, he must be held to have purchased, not canceled, the debt.

If, at the time of the sale of the wife's property, the husband agree to invest the money in other property for her, but, violating his agreement, take the title in his own name, he will be compelled to hold the new purchase in trust for her.

Davis v. *Davis*, 43 Ind. 561.

Sandford v. *Weeden*, 2 Heisk. 71.

Robison v. *Robison*, 44 Ala. 227.

In *Wallace's Appeal*, 5 Penn. St. 103, the widow of

the deceased, who was his administratrix, paid the intestate's debts with her own money. One of her children testified that

"we all agreed she should have the money that she put into father's estate."

She was held to have acquired the claims paid by her, by subrogation.

Bell, J. (p. 105), says:

"It is not, therefore, to be doubted that by the application of her own proper moneys in relief of the estate of her intestate, by the payment of his debts, Mrs. Lentz was entitled to be substituted in place of the creditors whose claims she had discharged, and as a consequence, might claim to use their securities, including the liens, created by operation of law, upon the real estate of the decedent, if, at the time of the payment by her, such debts were liens."

In three carefully considered cases, the same principle has been applied to coupons upon mortgage bonds of railroad companies, paid, by agreement between the mortgagor company and the party advancing the money, without the knowledge of the coupon-holders, who received the money, and who supposed they were paid. The coupon-holders have the right to insist that, as the coupons were not sold, this subrogation shall not affect the priority of the principal and the other coupons, and that the coupons thus paid shall he junior to them. But as to the debtor, and other lienholders, the subrogation is perfect.

Miller v. *Rutland and Washington Railway Co.*, 40 Vt. 400.

Union Trust Co. v. *Monticello and Port Jervis Railway Co.*, 63 N. Y. 311.

Haven v. *Grand Junction Railroad and Depot Co.*, 109 Mass. 88.

In the first of these cases,

"Bradley advanced money, and took up certain coupons, on the faith of an agreement with the directors of the corporation that he should have the benefit of the mortgage. *Held*, That he should be protected, as it appeared that no superior equity forbids it."

The Court say (p. 408):

"A Court of Chancery will uphold a mortgage for the benefit of a party who has advanced money upon it when equity requires it. It is not indispensable for this purpose that the creditor in the mortgage should have been a party to the agreement that the mortgage should be kept on foot. It is often done where there is no agreement at all to that effect, but where all parties, at the time the money is paid, intend it as a payment and satisfaction of the mortgage."

In the case of *Union Trust Co.* v. *Monticello and Port Jervis Railway Co.* 63 N. Y. 311, the Court of Appeals of New York held that,

"Interest coupons upon the bonds of a railroad corporation received by one who has advanced the money with which they were taken up, under an agreement that they were to be delivered to him uncanceled, as security for the advances, as against the corporation, are valid securities in the hands of the holder, and a mortgage upon the corporate property given to pay the bonds may be enforced for his benefit."

The Court (p. 313) say:

"The holders who presented the coupons for payment generally knew nothing of this arrangement, and supposed when they received the money and delivered up the coupons that they were paid."

And (p. 314):

"Here the holders of the coupons did not agree to assign or transfer them to Smith, and did not, in fact, do so. When they delivered these coupons to the Trust Company they supposed they were receiving payment of them, and Smith undoubtedly knew this. He, however, intended to take and hold them and keep them in being as his security for the money advanced. This he could do as against the railway company; and as against it the mortgage could be enforced for his benefit. It had not paid the coupons, was in no way harmed by their payment by Smith, and he advanced the money for its benefit upon the request of its principal officer."

In *Haven* v. *Grand Junction Railroad and Depot Company*, 109 Mass. 88, it was held that,

"Interest coupons due on mortgage bonds of a railroad corporation were detached and presented for payment. The corporation being out of funds, they were paid at its office with money voluntarily supplied for the purpose by D. K. (who was president and a director of the corporation, and its creditor to a large amount), upon an understanding between him and the corporation that they were not extinguished as against it, but were to be held by him in place of the persons who presented them. These persons had no intention of assigning to any one, and supposed that they were paid and extinguished by the corporation in regular course of business. The transaction was designed to maintain the credit of the corporation and protect D. K., as its creditor, but not to enable it to sell any of its bonds or coupons. The belief, however, thereby created that it was able to pay and did pay these coupons at maturity, was held and acted on by another corporation in subsequent purchases of the bonds from individual holders of them; but these purchases were made at and below the par value of the bonds and accrued interest, and were not made till between eight and nine years afterwards, and then with a view to acquire title to lands which constituted the mortgaged security, and which this corporation had voted to buy. *Held*,

that after a judicial sale of the lands upon foreclosure of the mortgage, D. K. was not estopped to maintain a claim for the amount of the coupons paid by him, with interest from the day of payment, against a surplus of the proceeds of the sale remaining after full satisfaction of the claims of all the other creditors."

Upon page 97, the Court say:

"The only parties who could have any right to object to this proceeding would be the other creditors of the company, to protect whose rights the mortgage was given. If the security had proved insufficient to pay the entire debt, the other mortgage creditors might say that when the coupons of July 1, 1856, were given up, they were understood to be paid and canceled; that they were presented to the treasurer at the usual place and in the usual manner, for payment, and not for assignment, and that Kimball having taken part in a transaction, which was understood to be a payment, is estopped now to come forward as a purchaser and assignee, and thereby diminish the dividend which the other creditors, whose claims were covered by the mortgage, were entitled to receive. But this, we think, is as far as any *estoppel in pais* can go as a bar to Kimball's claim."

For these reasons it seems to us clear that the court below failed to administer the equity to which Mrs. Grigsby was entitled. Had she not interfered and supplied money out of her separate estate, with the intent to keep the claims alive, and with the understanding that the trust fund should be applied to her reimbusement, the fund itself would have paid the claims, her money have remained in her own possession, and the *fourth*-class creditors got nothing. How can it be contended that they

shall take the benefit of acts done at her expense, without contribution from them, in no wise injurious to them, not tending to diminish any fund likely to reach them, but which simply exchanged her money for the trust fund, applying the former to the preferred creditors, and giving her in lieu thereof a precisely equal amount of the latter, especially when it was understood and agreed at the time she advanced these moneys that she was to be reimbursed out of the trust estate?

II.

The appellees ceased to have an interest in the trust fund on August 28, 1860, *when the acceptances of Taylor, Shelby & Co. were reduced to judgment against Taylor & Shelby alone.*

The appellees can claim no interest as creditors of Taylor, Shelby & Co. Had they seen fit voluntarily to release Grigsby, their right to share in the proceeds of this fund would have ceased. If, by accepting a security of a higher nature from Taylor and Shelby, they have extinguished their claim upon Grigsby, the same result must follow. In each of these cases they have voluntarily canceled his liability. The act is theirs, done for their own supposed advantage. The law has declared the result, viz, extinguishment of the liability of Grigsby, extinguishment of the debt of Taylor, Shelby & Co., and the substitution therefor of the obligation of Taylor & Shelby alone. How can the appellees, after

procuring this change in the security, claim to be *cestuis que trust* under a deed given

"to secure the payment . . . of all the debts of the house of Taylor, Shelby & Co., . . . for which said party (Grigsby) may be liable."

First. Grigsby's liability ceased with the confession of judgment. The judgment extinguished it.

Grigsby's cross-bill (Record, 20) charges that on August 28, 1860, Purcell

"owned and controlled"

the bills of exchange sued on in the bill of complaint in this case, and that on that day Taylor and Shelby entered into an arrangement with Purcell by which they confessed judgment in his favor on said bills in the Fayette Circuit Court. This is not controverted by the appellees, in their answers to the cross-bill (Record, 26). They merely deny that the confessed judgment was secured by any collaterals, and aver that it was intended as a

"solemn declaration of the amount then due by said Taylor, Shelby & Co. to said Purcell & Co. and said Farmers' Bank."

The record of the judgment may be found on pages 13 and 14 of the Record of this case. This shows a judgment confessed August 28, 1860, by

"the defendants, Edmund H. Taylor, jun., and Isaac Shelby, personally, . . . in open court, and with the assent of the plaintiffs and by permission of the Court,"

in an action against them

"and J. Warren Grigsby, partners as Taylor, Shelby & Co."—"on bills of exchange,"

for $15,456.97, with interest from September 21, 1857, and for $7,650.85, with interest from October 1, 1857, and $6.24—to be credited with $2,156.10 paid on February 20, 1859, and $7,500 paid on March 13, 1860.

There is now no principle of law better settled than that a judgment recovered against some, upon a cause of action existing against all the partners in a firm, or other joint contractors, is a bar to any further proceeding against the others.

The contrary was once supposed to have been proved, if not upheld, in *Sheehy* v. *Mandeville*, 6 Cranch, 253. But the opinion expressed in that case was disapproved and unfavorably criticised in many cases.

Robertson v. *Smith*, 18 Johns. 459.

Ward v. *Johnson*, 13 Mass. 148.

Smith v. *Black*, 9 Serg. & R. 142.

Scott v. *Colmesnil*, 7 J. J. Marsh. 419.

Wann v. *McNulty*, 2 Gilman, 359.

Taylor v. *Claypool*, 5 Blackf. 558.

Trafton v. *U. S.*, 3 Story, 651.

Woodworth v. *Spaffords & Earl*, 2 McL. 168.

And in England, in—

King v. *Hoar*, 13 M. & W. 495.

And *Sheehy* v. *Mandeville* was finally overruled, and the true rule established in *Mason* v. *Eldred*, 6 Wall, 231, in which the opinion of Mr. Justice Field restates the doctrine he had previously announced in *Brady* v. *Reynolds*, 13 Cal. 31.

To the same effect are a multitude of other decisions.

Candee v. *Clark*, 2 Mich. 255.

Henderson v. *Reeves*, 6 Blackf. 101.
Crosby v. *Jeroloman*, 37 Ind. 276.
Root v. *Dill*, 38 Ind. 169.
Kingsley v. *Davis*, 104 Mass. 178.
Averill v. *Loucks*, 5 Nev. 93.
Hollowell v. *McDowell*, 8 Upper Canada (C. P.), 21.
Harris v. *Dun*, 18 Ib. (Q. B.), 352.

In Kentucky the same doctrine was held in *Nichols* v. *Burton*, 5 Bush 320.

Chief Justice Alex. S. Johnson, in *Suydam* v. *Barber*, 18 N. Y. 470, stated the rule thus:

"According to the common law of this State, a judgment against one of several joint debtors, obtained in an action against him alone, is a bar to an action against the others. (*Robertson* v. *Smith*, 18 Johns. 459; *Pierce* v. *Kearney*, 5 Hill, 82; *Olmsted* v. *Webster*, 4 Selden, 413.) It is held to be a bar upon the ground that, by the recovery of the judgment, the promise or cause of action as to the party sued has been merged and extinguished in the judgment, by 'operation of law, at the instance and by the act of the creditor.'"

To the same effect is *Benson* v. *Paine*, 17 How. Pr. 407; (S. C.) 2 Hilton, 557.

Nor does want of knowledge or information by the plaintiff taking the judgment, that there were other partners or contractors jointly liable, prevent the merger or assist him to hold such others to liability after the judgment.

Scott v. *Colmesnil*, 7 J. J. Marsh. 416.

Smith v. *Black*, 9 Serg. & R. 142.
Moale v. *Hollins*, 11 G. & J. 11.
Penny v. *Martin*, 4 Johns. Ch'y, 566.
Willing v. *Consequa*, 1 Pet. C. C. 301, 307.

In three very well considered cases, the courts of Delaware, Ohio, and Iowa have held that a judgment by confession of some of the partners of a firm or joint contractors, merges the original cause of action, and extinguishes the liability of the others thereon.

Sydam v. *Reed & Cannon*, 1 Houston, 431.
Sloo v. *Lea*, 18 Ohio, 279.
North & Scott v. *Mudge & Co.*, 13 Iowa, 496.

In *Sydam* v. *Reed & Cannon*, where two of three partners had given a bond and confessed judgment upon it for a firm debt, it is said that such bond and judgment

"will *discharge* the original joint liability of a third partner, because it changes and extinguishes the original nature of the debt, and thereby becomes a new debt of a higher grade of the partners giving the bond and confessing the judgment."

Nor can the creditor have any relief in equity, even if he were ignorant of the liability of the partner or joint contractor against whom judgment was not recovered.

Penny v. *Martin*, 4 Johns. Ch. 566.
Willing v. *Consequa*, 1 Pet. C. C. 301, 307.

More fully than by release under seal, are the appellees barred from the assertion of their present claim. More fully, because not only was the judgment rendered at their instance, and thus is their act, in which it resembles a release, but, being a judgment, it is no longer open

to dispute, and so is unlike, but much more effective than a release.

Secondly. This extinguishment of the liability of Grigsby made the debt that of Taylor and Shelby alone, and no longer of the "house of Taylor, Shelby & Co." That the *fourth-class* creditors may participate in the distribution of the proceeds of the trust fund, three circumstances must concur. They must be creditors of the "house of Taylor, Shelby & Co.," and, as such, holders of a debt for which Grigsby "may be liable," created after July 14, 1841. None of these is here shown. Grigsby's liability has been discharged. The firm of Taylor, Shelby & Co. was never composed of Taylor and Shelby alone, and these are not debts of that house created after July 14, 1857. They are debts created after July 14, 1857, but they are debts of Taylor and Shelby, not of Taylor, Shelby, and Grigsby, who composed that firm. If the judgment is a "solemn declaration" of anything, it is of this: It imports with absolute verity that Grigsby was not a partner, was not liable on these debts; that these were the liabilities and debts of Taylor and Shelby alone. The appellees need not have taken this judgment. It was not Grigsby's fault that they recovered it; by no act or deed, by no persuasion of argument or conduct, did he induce them to accept it. They and their counsel, Mr. Kinkead, thought there might be an advantage in it, and they must take its burdens with its gains.

Upon this judgment against Taylor and Shelby alone, no execution could have been levied on the firm property, except as a means of reaching their interest in

the surplus that might remain after payment of debts. Grigsby as a partner had a lien on the firm property for the application of the firm property to firm debts;—and debts which are in judgment against some of the partners are, as we have shown, not debts against all, as they must be, to be firm liabilities. How can one who has solemnly declared, and the same has passed into judgment, that some only of the partners of a firm are liable to him, claim to be a partnership creditor? Whether we apply the principles of equity or the statutory laws of bankruptcy, the partnership property is appropriated to those who are creditors of all the partners, and the surplus of such property only, after paying them in full, with the other individual assets, to those who are creditors of the individuals.

III.

If Grigsby remained liable after the judgment, it was only as surety for Taylor and Shelby, and the refusal to accept the notes of the Farmers' Bank discharged him from such liability.

That an outgoing partner is a surety and entitled to all the rights of a surety, is established by

Oakeley v. *Pasheller*, 4 Cl. & F. 207; 10 Bligh, 548.

Liquidators of Overend, Gurney & Co. v. *Liquidators of Oriental Financial Corporation*, 7 L. R. Ch.

Appeals, 142; affirmed in House of Lords, 7 L. R. Eng. & Irish Appeals, 348.
Wilson v. *Lloyd*, 16 Eq. Cases, 60.

It can hardly be contended that when judgment has been taken against two of three partners, with full knowledge, as here, of the liability of the third, he is not in a position equally advantageous with that of a retiring partner. Especially in a case like this, in which it is shown that his connection with the firm was merely nominal, and, however intended, operated as a fraud upon him.

Considering Grigsby, therefore, as it seems to us we well may, as occupying the position of a surety, we find that his principals offered, after the judgment, to cancel the claim, by the surrender of notes of the creditor to an equal amount.

Between the parties, this may not have paid the debt, on the principle stated in *Bissell* v. *Hayward*, 96 U. S. 580, 587, but it discharged the surety.

The principle of equity jurisprudence applicable to this case is thus stated, in 1 Story's Equity Jurisprudence, § 325.

"Indeed, the proposition may be stated in a more general form; that a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases, the latter will be discharged, and he may set up such conduct as a defence to any suit brought against him, if not at law, at all events in equity."

If it be said that Taylor does not prove the exact

amount tendered, we answered this is not Grigsby's fault. He did not make the delays which have obliterated the details of the transaction from the memories of the actors. Taylor made the calculation, and tendered the notes, and testifies that it was

"an amount he conceived to be in full of the amount due the plaintiffs." (Record, 102.)

This should at least have the effect to throw the burden of proof on the complainants, to show that Taylor's calculation was inaccurate. Instead of this, they produce Mr. Kinkead, who admits that payment by these notes was proposed and declined, but denies the actual tender. This negative testimony can not outweigh Taylor's positive statement, especially considering Kinkead's admission (Record, 118), that

"the lapse of so many years, filled up with so much of excitement, no doubt, has obscured many things from my memory."

If it be said that the debt to Purcell could not be canceled by the set-off of Farmers' Bank notes, we answer, true, but so much the worse for the two acceptances not held by Purcell, and of which the Farmers' Bank was, until May 9, 1868, the owner, and which its receiver held until February 9, 1871 (Record, 2, 3). This attempt at set-off was in 1864.

At least to the amount they call for (about two-thirds of the complainant's claim), the refusal to make the set-off prejudiced Grigsby. The notes were then worth ninety-five cents on the dollar (Record, 102) in United States treasury notes. Nor is the value of Tay-

lor's testimony, that he tendered an amount which he conceived to be in full of the sum "*due the plaintiffs*," weakened, if we treat only the two acceptances then held by the Farmers' Bank as liable to cancellation by this set-off. This renders it certain, if it were not before, that his tender was sufficient in amount.

How could it be said that this testimony was *irrelevant?* Even if your honors think it insufficient, it was certainly entitled to be weighed.

IV.

The claim of the complainants is stale and barred by lapse of time.

The law of Kentucky, the *lex fori*, applies to this case and governs the remedy here sought. By that law a claim of this kind is barred in five years. Nearly three times that period had elapsed when this suit was brought.

But, it will be argued, the Circuit Court gave all the effect to the statute of limitations it was entitled to receive, when it was held, upon exceptions to Grigsby's answer, that it barred the personal claim of the complainants upon him, but not their assertion of an interest in the trust fund.

This trust was created "to secure" the payment of debts due by Grigsby. It is a trust by way of hypothecation. It is not a bounty, or a settlement, as most trust estates are, but was given by way of security. In Kentucky, when a debt is barred by lapse of time, the right to

subject the security to enforce a lien given or reserved to secure the debt is also barred.

Vandiver v. *Hodge*, 4 Bush 538.

Yeates v. *Weeden*, 6 Bush 438.

So also in Illinois—

Harris v. *Mills*, 28 Ill. 44.

Pollock v. *Maison*, 41 Ill. 516.

Moreover, the trust deed was given to secure debts "for which the said party may be liable," and thus evinces upon its face the purpose to conform to this rule of law. When Grigsby ceased to be liable, the security was discharged both by the letter of the contract and the law of the State.

But, it may be said, this was a trust estate, and trusts are not within the statute of limitations. To which we reply that such is not the law of Kentucky with regard to trusts of this class, viz, created by way of security for debts.

In *Vandiver* v. *Hodge*, 4 Bush 540, a case in equity, Judge Robertson says:

"And no action being maintainable on the notes, the lien, which is only a mere security, cannot be enforced. There is no express trust. The lien is only a peculiar sort of resulting trust, and the statute of limitations applies to all implied trusts. *Besides, had the trust been express and not within the statute, still it could not be enforced as the mere incident to the debt, which is the principal, if the debt itself is paid or barred by time.*"

There is nothing in the Kentucky reports to impair the effect of this statement. And if there lived, within the borders of the Commonwealth, a jurist, who knew its

laws, and whose exposition of their meaning ought to put all doubts to rest and silence all denials, it was George Robertson. *Obiter dictum?* Yes, but it is the *obiter dictum* of the Court of Appeals, speaking by the voice of one who, as lawyer, teacher of law, judge, was worthy to be ranked with the *juris consulti*, whose words were law, who were, therefore, rightly, also called *juris auctores.*

V.

The Court erred in taxing the portion of the fund distributed to Mrs. Grigsby with $704.30, *toward the* $1,000 *fee allowed complainants' counsel.* (Record, 128.)

When this litigation began, the fund was under the the control of Grigsby, as agent for his wife. The services rendered by complainants' counsel consisted of the prosecution of this unjust case against her, and the recovery from her, for his clients, of $6,684.59, and for Apperson, of $2,266.83.

Let those who received the benefit pay the bill. Mrs. Grigsby must pay her own counsel, why should she bear the burthen of discharging the claims for services rendered against her, in depriving her of the fund which belonged to her?

If it prove, as we think it must, that Mrs. Grigsby was entitled to priority in distribution out of the proceeds of the trust fund, to the extent claimed by her, then it must be quite clear that she ought not to pay the complainants' solicitor for trying to defeat her just rights. If it prove

that the complainants had lost their claim upon Grigsby, then the bill ought not to have been filed, and no compensation should have been awarded their solicitor for filing and prosecuting it.

But, under any circumstances, we submit that the value of the services rendered to the trust fund by Mr. Harris, must be measured by the amounts ultimately payable out of it to his clients and to Apperson, and can not extend to the moneys coming to Mrs. Grigsby, who had, before the bill was filed, a satisfactory knowledge and control of the fund, did not employ him, and returns no thanks for his intervention. According to Grigsby's answers (Record, 18), at the time this bill was filed, he was, with his wife's approval, endeavoring to negotiate a settlement, by which the note placed in Grinstead's hands, part of the trust fund ($9,750 in amount), should be applied to the payment of the *fourth*-class creditors, except Chenault & Co. (a judgment represented by Thomas and the heirs of Shouse, and found by the Circuit Court not to be binding on Grigsby), and he be released, and that the note in the hands of Moore ($9,750) should be applied to the expense of the trust, and to whatever claim Chenault & Co. might have, and the residue of the trust fund to the *first*-class claims represented by Mrs. Grigsby. It seems to us that this was a more beneficial and productive arrangement to Apperson, the only existing *fourth*-class creditor, than any this case can produce. Grigsby was insolvent, has since been released by death, and the property, we are confident, will not produce more, after paying Mrs. Grigsby, than the amounts Grigsby was

thus trying to secure to the *fourth*-class creditors. He was thus acting in good faith, for their advantage, and his wife's separate estate should not be taxed with the charges of this unnecessary and injurious disturbance.

VI.

The decree to be entered here.

We respectfully submit that we are entitled, under section 701 of the Revised Statutes, to a decree:

1. For the restoration of the fund paid to the complainants, to their solicitor, and to Apperson.

Story's Eq. Pl. sec. 420.

Adams on Eq. 418.

Ex parte Morris & Johnson, 9 Wall. 605.

South Fork Canal Co. v. *Gordon*, 2 Abb. U. S. 480.

2. Of additional distribution to Mrs. Grigsby, to the extent of the debts paid by her to (1) the Agricultural Deposit Bank, principal $5,000; (2) the Commercial Bank of Kentucky, principal $2,500; (3) N. H. Walter, principal $837; and (4) the miscellaneous creditors enumerated in the master's report (Record, 38, 39), at least to the extent of $3,500, together with interest on all these four classes of claims.

As to the $3,500 item, we submit that the trust deed says "*about*" $3,500," and therefore we are not limited to that precise sum. The whole amount thus paid by Mrs. Grigsby was $2,440.31 + 1,830 + 700 = $4,970.31.

3. That the residue of the trust fund not disposed

of by the decree below, be reduced to money, and appropriated as follows:

1. To Susan P. Grigsby, until the principal and interest of the *first*-class claims have been reimbursed to her.

2. To R. Apperson, Jr., the only *fourth*-class creditor in existence.

3. The residue, if any, to the administratrix of J. Warren Grigsby.

4. That the costs of this unnecessary litigation should be paid by the complainants, who had ceased to be creditors of Grigsby more than ten years before it began.

Respectfully submttted,

HOADLY, JOHNSON & COLSTON,
JOHN W. STEVENSON,
Of Counsel.

DECEMBER 7, 1878.

Supreme Court of the United States

WILLIAM H. THOMAS, . . . Appellant,

VERSUS

C. W. PURCELL & CO.,
J. WARREN GRIGGSBY, et. al. } . Appellees.

Assignment of Errors.

BRIEF FOR APPELLANT.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE, KY.

Supreme Court of the United States

WILLIAM H. THOMAS, . . . APPELLANT,

VERSUS

C. W. PURCELL & CO., J. WARREN GRIGGSBY, ET AL. } APPELLEES.

Assignment of Errors.

The Circuit Court erred:

(1) In sustaining[1] the fourth exception of the complainants below[2] to the commissioner's report, which exception is substantially as follows:

The Master erred in allowing the claim of W. H. Thomas, because there is no evidence that the same was created since the 14th of July, 1857.

(2) In sustaining the second exception of appellee J. Warren Griggsby[3] to said report, which exception is substantially as follows:

The commissioner erred in allowing the claim presented by W. H. Thomas.

[1] Page 123. [2] Page 122. [3] Page 121.

EXPLANATION.

The undersigned deems it due to himself to explain how it is that in the earlier parts of the record in this case he appears as counsel for Griggsby, and in the latter part as representing the antagonistic claims of Apperson and Thomas. Before the institution of the suit he had been employed to procure a settlement of these claims, and had an arrangement with Col. Griggsby for a compromise of them contingent upon the defeat of the claims of the complainants, to which it was then supposed there were good defenses. In the outset of the case, therefore, and before the defenses were overruled, there was a common interest between Col. Griggsby and the other clients of the undersigned.

The undersigned agreed to represent this common interest in the name of Col. Griggsby—who only, of the three, was then a party to the suit—with the understanding that, if the case should be referred to a commissioner for a settlement of the trust, Col. Griggsby should procure other counsel.

H. C. PINDELL.

BRIEF FOR APPELLANT.

Statement of Facts.

Prior to the 11th of July, 1857, Taylor, Shelby, and Shouse were engaged in the business of banking in the city of Lexington, Ky., under the firm name of Taylor, Shelby & Co. About that time Shouse, having become suddenly embarrassed in his finances, withdrew from the firm, and the other partners, apprehensive that the credit of the house might be endangered by his failure, applied to Col. Griggsby to permit himself to be announced as a partner in the place of Shouse, and contingently, upon the completion of certain arrangements then in contemplation, to become an actual partner. (Griggsby's answer, page 16, and depositions, pages 111 and 113.) He assented to this request, and an announcement, of which the following is a copy, was published in the Lexington Observer and Reporter, a newspaper published in Lexington:

The firm of Taylor, Shelby & Co. is this day dissolved by mutual consent, William Shouse withdrawing.

(Signed) E. H. TAYLOR,
ISAAC SHELBY,
Lexington, Ky., July 11, 1857. WILLIAM SHOUSE.

The undersigned have this day formed a partnership, and will *continue the business of the old house* under the same name. [Page 119.]

(Signed) E. H. TAYLOR,
ISAAC SHELBY,
Lexington, Ky., July 14, 1857. J. WARREN GRIGGSBY.

McClellan, Chenault & Co., prior to this advertisement, had a deposit account with "the old house," and continued it with the new one till its failure, two or three months afterward, when the balance to their credit was $4,975.11.

About the time of the failure, Col. Griggsby made an assignment of certain property in the city of Chicago to R. Pindell for the benefit of his creditors, providing for them in classes; so much of the provision for the fourth class as is material in this case being as follows:

"Fourthly: To secure the payment, after said debts, etc., men-"tioned are paid, of all the debts of the house of Taylor, Shelby "& Co., created since the 14th day of July, 1857, for which said "party may be liable, it being the express intent of this inden-"ture not to create any liability except as they may now legally "exist" [against] "him." Pages 5 and 42.

This property was sold a few years since, and certain notes taken in payment for it. Soon after the sale R. Pindell died, and these notes came into the possession of the defendants to the bill in this case, which was filed to settle up the trust, and have the proceeds of the notes distributed according to the terms of the deed.

Upon the reference of the case to the Master to take proof of debts, W. H. Thomas, to whom the claim of McClellan, Chenault & Co. had been assigned, asserted it (page 88) before the Master, as provided for under the above quoted provision of the assignment. The Master allowed (pages 45 *et seq.*) the claim; but at the hearing the court sustained (page 123) exceptions to the allowance; and the question presented by Thomas's appeal is as to the correctness of this decision.

On one point in the case it is a material fact that, soon after the assignment was executed, McClellan, Chenault & Co. sued both firms in the Fayette Circuit Court, and recovered a judgment for their claim against all the members of both. Page 95.

The Questions to be Decided.

The general principles of law relating to the incurrence by an incoming partner of liability for the pre-existing debts of the firm are well settled.

He incurs no such liability by merely becoming a partner.

He can only become so liable by contract, express or implied, based upon sufficient consideration.

"A very little matter will make him liable" for such debts. Ex p. Jackson, 1 Vesey, jr. 132. Very little is necessary to show the assent of the creditors to the liability. Ex p. Wil-

liams, Buck, 13; Ex p. Peele, *ib.* 474. Slight circumstances will authorize an inference that the partnership has adopted as joint the separate debts of the partners. Notes 1 and *a*, 1 Vesey, jr., and cases cited; Colyer Part., sec. 522, *et seq.*; Pars. Part. 435; Lindley Part., side-pages 314, 359.

Although no case has been found involving the point, it is a corollary of the last proposition that if there be a writing, of which the construction is doubtful, but which may well have been intended to incur such a liability, the doubt should be resolved in favor of the liability.

If it be contended that the liability of the new firm has released the old one, the contract may be proved by parol.

If it be contended that both firms are liable, it must, under the statute of frauds, be evidenced by writing. Steinberg v. Callanan, 14 Iowa, 260; Crum v. Abbott, 2 McLean, 234.

As the evidence relied on in this case is written, and sufficient under the statute of frauds; and as the statement of Griggsby's deposition (pages 114–15) as to the character of the judgment in the Louisville Chancery Court is excepted to (page 118) and clearly incompetent, there is nothing in the record to render it material as to whether in this case the liability of the new firm for the debts of the old was by substitution or in the nature of a suretyship. And, so far as is perceived, there can not be in this case any other than the following questions:

(1) Has the debt of the new firm for the deposits of the old been created since the 14th day of July, 1857?

(2) Does the fourth class provided for in the assignment include the debts incurred for deposits created on that day?

Was the Debt Created since the 14th of July, 1857?

There is no issue in this record as to whether the new firm became indebted at all for the debts of the old one. The exception of the complainants to the commissioner's report raises the issue only that "there is no evidence that the same *was created since the 14th day of July*, 1857," and in considering a commis-

sioner's report the court determines only the questions raised by the exceptions. Hodges v. Salomons, 1 Cox, 249; Green v. Weaver, 1 Sim. 404; Pearson v. Knapp, 1 Mylne & Keen, 312.

Even if Griggsby's exception might be broad enough to raise this issue, if it had been filed by any one else, as coming from him it can not be so construed, because he was estopped to raise the issue by the judgment of the Fayette Circuit Court, in which this identical issue was adjudicated. Page 95. But in order to determine the question as to whether the new firm became so indebted since the 14th of July, 1857, it is necessary to ascertain how it incurred this indebtedness.

Griggsby in his deposition, taken in behalf of his wife and others, contesting the claim of Thomas, says: "I was advertised "as a partner of a new firm, composed of Taylor, Shelby, and "Griggsby exclusively, under the same firm style of Taylor, "Shelby & Co., which was in no wise responsible for the liabili- "ties of Taylor, Shelby, and Shouse, the members of the old "firm." Page 112. And again, after stating Shelby's propo- osition to him to be permitted to use his name as a member of a new firm, he says: "Deponent consented to this proposition "without being in any wise interested in the business, or "actually a partner in the firm, except as to strangers with "whom new business might be transacted. He simply loaned "his name to Taylor and Shelby to give credit to the concern "with their parties in the transaction of new business." Page 113.

For several reasons it was not contended below that these statements were sufficient to show that no debt at all has been created against the new firm. They are not statements of fact, but of Col. Griggsby's legal opinion of the effect of the facts. They do not purport to state what was said, nor even what was understood or intended. But if they did, the weight of evidence against their accuracy would be overwhelming. They were made from recollection about seventeen years after the facts occurred in a suit in which his wife's separate estate is largely involved, and would be in regard to a character of facts of which his ideas might well have been largely influenced

by inference, and of which therefore his recollection would be more largely affected by his feelings at the time they were given.

They would be inconsistent with the statement on the next page of the same deposition that "a large amount of my "private funds were used in the subsequent liquidations, *part "of it going to the creditors of the old firm of Taylor, Shelby & "Shouse.*" Page 114.

They would be inconsistent with what he states to have been, and which the circumstances show must have been, the purpose of the arrangement "to prevent injury to the business of the house growing out of Shouse's embarrassment." Page 112. The great injury to be apprehended in any business from a loss of credit is from the existing creditors. The danger is that they will become alarmed and insist on the promptest liquidation. This is true in an eminent degree of bank depositors payable on demand. The injury from the loss of new business is comparatively insignificant.

Such statements too would have been utterly inconsistent with the fact that Griggsby the year after the arrangement, when Shelby was alive, and the facts fresh in recollection, permitted judgment (see judgment, p. 95) to go against him for this very debt without setting up any such defense. In order to avoid the force of this omission he volunteers the statement that "the pretended judgment purporting to have been rendered by "the Fayette Circuit Court in the case of McClelland, Chenault, "&c. v. Taylor, Shelby & Co. is fraudulent and void, and was "obtained without right as to him; that his appearance therein was "entered without his previous knowledge or consent or *subsequent "notification;* that the answer of the defendants to said judgment, "of whom it is pretended he is one, were drafted and executed, "sworn to and filed, without his previous knowledge, consent, or "authority, or *subsequent notification;* that he had not then, and "never at any time, authorized any one to draw, swear to, and "file said answer in said cause, and that the same was filed before "he was *served with process in said action*, and within the juris-"diction of said court rendering or purporting to render said

"pretended judgment, and that said answer is not now, and never "was, his act and deed." Page 114.

The inconsistency between the statements that he had no subsequent notification of the entry of his appearance and the filing of the answer in his name, and the admission that he was served with process, as well as the ground upon which, as appears in his cross-examination (p. 113) he alleged that the judgment was void, destroy the force of the avoidance. To say nothing of the facts appearing in the record, that he was served with process on the 22d of January, only three days after the answer was filed (p. 92), and that he acquiesced in it, and the taking of several other steps in the cause in the name of "the defendants," until the trial and judgment on the 27th of August following. Page 95. The contemporaneous act speaks louder than the recent words from a recollection seventeen years old.

But the advertised writing when read in the light of the circumstance that it was published to prevent danger to the credit of the old house by the sudden development of the embarrassments of the retiring partner—to prevent, it may be fairly said, a run upon the bank by its depositors—shows clearly that it was meant as a proposition that the new firm would be responsible for the deposits with the old if it should be permitted by the depositors to continue the business of the old house. The danger was one well understood by all people of ordinary business knowledge, and as well by the depositors as the members of the firm. It was the dictate of the most ordinary prudence to give to the depositors some additional security for the safety of their funds, and it would have been absurd to say that the advertisement informed them that a new firm, of reinforced capital, would carry on a business similar in character to that which was transacted by the old house. Such information as that would have had no effect in preventing a run. It was that it would "continue the business of the old house," the identical business in which it was then engaged.

What was that business? It was to receive the moneys of its customers and pay it back to them upon their check as and whenever in the course of their affairs they should have use for

it. How could that business be continued? Not otherwise certainly than by continuing to pay its deposits, as it was bound to pay them. This was the contemporaneous construction of all parties. There was no run upon the bank. The new firm continued as before to pay the checks of the old depositors. A part of Griggsby's private funds was appropriated to their payment. Nay, when the suit was soon afterward brought for this very deposit, other defenses were set up and vigorously insisted on, but not an intimation that the new firm was not as much bound as the old, judgment was permitted to go against both, and, so far as that defense was concerned, by default.

The language of the advertisement implied a condition to the proposition, that the new firm would only be bound to pay the deposits if withdrawn according to the course of business. It is the drawing of the deposits only at such times which is the source of the profit of banking, and constitutes it properly a business. According to Webster the purpose of profit is an element of the idea—business. It is certain that the whole of a large number of depositors will not want to use their funds at one time. And the fact that when some depositors wish to use their moneys, others deposit theirs, leaves a constant surplus in the bank which can be safely and profitably used by the banker in short loans and the making of exchanges. And though the depositor has a sort of exceptional right to draw his money whenever his caprice or apprehension moves him to do so, this is not according to the course of the business of banking. And therefore the offer "to continue the business of the old house" did not involve an offer on the part of the new firm to pay the deposits of those who should, from apprehension, choose to immediately draw their moneys. And if, upon the appearance of the advertisement, the depositors had made a run, Griggsby would not have been responsible to those who did so. And if a number of those depositors had drawn money enough to cause a suspension of the business of the bank, and by forcing a liquidation to subject the old house to such losses as would render a continuance of its business impossible, this would

probably have been a rejection of the advertised proposition, and Griggsby would not have become responsible to any one.

But there was no run. The new firm continued the business of the old house for about three months. There is no pretense that the final failure resulted from a run or a refusal in any way of the depositors of the old house or any number of them to accept the proposition of the new one. The inference was therefore unavoidable that the proposition was accepted, and a debt thereby created against the new firm.

If this view be correct, the question involved as to when the debt was created against the new firm, seems to be one of easy solution. It could not have been so created until the depositors assented to the proposition. It is not a case in which the court can presume their assent, and therefore hold the contract to have been closed as soon as the proposition was made. The depositors might well have declined the security. The question then is, when was this assent given? And it seems clear that but one answer can be given to it. After a reasonable time for the depositors, either severally or collectively, to learn of the proposition, consider it, and either draw or leave their money as they should determine. Solve the alternative as to several or collective action either way, and it so certainly seems that one day is palpably necessary for these purposes that no argument can be necessary to demonstrate it. The debt therefore has been created against the new firm of Taylor, Shelby & Co. since the 14th of July, 1875, and clearly comes within the fourth class provided for in the deed of trust.

Did the Fourth Class Exclude Debts Created on the 14th of July?

But if this were otherwise it is contended that the fourth class of the assignment includes debts created on that day, that the clauses "since the 14th day of July" and "for which said party may be liable" were manifestly intended as cumulative and not distinctive description. And this because the contrary construction is believed to be unreasonable. No reason can be imagined which should induce Griggsby to discriminate between the debts cre-

ated on that day and those subsequently incurred. Such a construction would exclude those who made deposits on that day, and who were probably the staunchest friends of the house, as well as those who would have become creditors if the proposition to the old depositors could have been accepted on that day. And if the intention had been to exclude these old depositors, they would have been mentioned by name rather than described by a circumlocution which would also probably include some for whom he would have been most willing to provide.

On the other hand the use of the phrase "since a day," or "since a time," to include what happened on and after a time or a day, meaning what happened since the beginning of the time or the day, is so common an inexactness that the supposition that the phrase was intended to exclude what happened during the time or the day is insufficient to induce the presumption that any thing at all unreasonable was intended.

For these reasons it is submitted that the decision sustaining the exceptions to the Master's report in regard to this claim should be reversed.

JAS. B. BECK,
H. C. PINDELL, } *For Appellant.*

Supreme Court of the United States.

No. 136.

J. WARREN GRIGSBY and SUSAN P. GRIGSBY, ... Appellants.

VERSUS

C. W. PURCELL, &c., ... Appellees.

ARGUMENT OF W. O. HARRIS FOR APPELLEES.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE, KY.

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Supreme Court of the United States

No. 136.

J. WARREN GRIGSBY AND WIFE, . . Appellants,

VERSUS

C. W. PURCELL AND OTHERS, . . . Appellees.

Argument for Appellees.

Deeming the statement of the appellants to be defective, I make the following

STATEMENT OF THE CASE:

In the year 1857 there was a firm of bankers doing business in Lexington, Kentucky, under the firm name of Taylor, Shelby & Co., and composed of E. H. Taylor, Isaac Shelby, and William Shouse.

On the 11th of July, in that year, the firm was dissolved by the retirement of Shouse, and on the 14th of July a new firm was organized under the same name, the appellant Grigsby taking the place of Shouse. Some effort was made in the court below to show that Grigsby never became an actual partner, but only "permitted himself to be held out to the people of Lexington, the place at which its business was transacted, as a partner of said firm," and that he was not liable as a partner, because the complainants did not know that

he was so held out. See his answer, page 16 of the Record. This defense was adjudged insufficient upon exceptions (Record, 19–23), and though no proof was taken upon it, it afterward appeared that his name was advertised in a newspaper as a partner with his consent (Record, 113-119); and he himself says, in a deposition, that he "loaned his name to Taylor and Shelby to give credit to the concern with *their* [other] parties in the transaction of new business."

Shortly after the formation of the new firm, and while Grigsby was in Virginia endeavoring to raise his part of the capital, the house suspended payments.

The effort to contest his liability on the ground of nominal partnership seems to have been abandoned in this court.

On the 10th day of December, after the failure, Grigsby, with whom alone we are concerned, made an assignment to R. Pindell of his real estate, situated in Chicago, for the benefit of certain designated creditors, who are arranged in the deed in four classes and directed to be preferred in that order.

Among the debts of the fourth class the deed names "all the debts of the house of Taylor, Shelby & Co. created since the 14th day of July, 1857, for which said party (Grigsby) may be legally liable, it being the express intent of this indenture not to create any liability except as they may now legally exist . . herein." Record, 5.

The assignee never settled his accounts, and never paid over any thing to the creditors; nor does it appear that he sold any of the trust property until May 3, 1870, when he made a sale, the deed reciting a cash consideration of $50,000, but the true consideration being sundry notes of outside parties, secured by liens on other real estate, and aggregating $50,070.

Of these, one for $9,750 was assigned by the trustee to Grinstead, a banker in Lexington, another for like amount to Moore, a lawyer in Chicago, and the remainder, amounting to $30,070 in face value, was turned over to Grigsby, the grantor in the trust deed. Record, p. 3.

Some time in the same year Pindell, the trustee, died, and on the 4th of August, 1871, Purcell and others, now the appellees here, filed their bill in the court below, averring that they were creditors of Taylor, Shelby & Co. "whose debts accrued since the 14th day of July, 1857," and praying the court to take possession of and collect the notes taken by Pindell as aforesaid, and to distribute their proceeds among the complainants and all other creditors under the deed of trust. The three holders of the notes, Grinstead, Moore, and Grigsby, were made defendants, and the two former suffered a default, and surrendered the notes held by them. Record, 15-24. Grigsby, the remaining defendant, made various defenses, all of which were adjudged bad, and judgment went against him, requiring him to turn over to the court's receiver the trust-funds held by him. Record, 27. Afterward the cause was referred to the Master to advertise for creditors and report a distribution of the fund, and among those appearing to prove debts was Susan P. Grigsby, wife of the defendant. She produced a decree of a circuit court of the state, empowering her, in a statutory proceeding had for that purpose, to make contracts, sue and be sued as a *feme sole* (Record, 254), and proved a large debt against her husband, which she averred to be secured by the trust deed. A portion of this claim was rejected, and she has united with J. Warren Grigsby in bringing the case to this court.

ARGUMENT.

I deem it most convenient to the court to take up in their order the appellants' assignments of error rather than follow the order in which the questions are discussed by counsel in their printed argument. The errors assigned are:

The circuit court erred

I.

In overruling Grigsby's demurrer to the bill.

In the extended printed argument I am unable to find any thing relating to this assignment of error.

The bill alleges that the complainants are creditors under the deed of trust from Grigsby to Pindell, that the defendants are wrongfully in possession of the trust-fund, and prays the court to supply the place of the dead trustee, and to make distribution among those who may be entitled. The assignment was doubtless meant to be merely formal.

II.

In adjudging Grigsby's plea to be insufficient.

This question is discussed on pages 48 to 54 in the printed argument for appellants.

The plea is, that after the execution of the deed of assignment, and before the institution of this suit, the complainants took judgment in the circuit court of Fayette County, Kentucky, against Taylor and Shelby, two of the members of the firm of Taylor, Shelby & Co., upon the debts set out in their bill, and that said judgment operated to release Grigsby, who was not a party to it. Record, 13.

We concede that at common law a judgment against one

or more joint obligors is a bar to a subsequent suit against the others. That has been well settled since the decision of this court in Mason v. Eldred, 6 Wall. 231.

Our contention is, that the rule has been abolished in terms by the following provision of the Kentucky Civil Code of Practice enacted in 1854:

"SECTION 39. Where two or more persons are jointly bound by contract, the action thereon may be brought against all or any of them at the plaintiff's option. Where any of the persons so bound are dead, the action may be brought against all or any of the survivors, with the representatives of all or any of the decedents, or against the latter, or any of them. Where all the persons so bound are dead, the action may be brought against the representatives of all or any of them. *An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others.*"

That partners are "jointly bound" on partnership contracts, and therefore within the express terms of the statute, is necessarily assumed in the argument for the appellants.

If they were severally, or jointly and severally bound, a judgment against one would be no bar to a subsequent suit against the others.

It has also been held in Kentucky that a statute regulating the liability of the representatives of "one jointly bound with another" applied to partners.

Maxcy v. Averill, 2 B. M. 107.

This court also held that the words "persons jointly indebted" in a Michigan statute of similar import embraced partners.

Mason v. Eldred, 6 Wall. 231.

It follows therefore that the statute *ipsissimis verbis* abolishes the common-law rule.

The learned counsel for the appellants have discussed the common-law doctrine, but have not referred to the statute, and I assume that the same arguments will be used against it which were brought forward in the court below.

It was argued there that the statute had received a construction contrary to its apparent meaning by the Court of Appeals of Kentucky, in the case of Nichols v. Burton, 5 Bush, 320, and that the courts of the United States are bound to follow that case.

In that case a creditor took the acceptance of one partner for a debt due by the firm, and obtained a judgment upon it. In a subsequent suit against all the partners it was held, that the first judgment was a bar, the court saying, "Our Code does not authorize separate suits at different times against the partners." The court below held that this was a plain oversight on the part of the Kentucky court, and refused to follow the decision.

It is evident from the opinion that the court overlooked section 39. The opinion refers to section 399, which authorizes judgment against one of several defendants, and a continuance as to the others, as the *only* alteration of the common-law rule. It appears from the report that section 39 was cited by counsel, but this is presumably a mistake of the reporter. It is not alluded to in the opinion, and the two are in plain conflict. It is true that this court in general adopts the construction put by the state courts upon their own statutes, but it is an abuse of language to call Nichols v. Burton a construction of section 39. Nothing more can be claimed for it than that it is a repeal of section 39 by ignoring it in laying down an inconsistent rule.

But this court has never professed to follow the last state decision, as such. The familiar rule is, that your Honors follow the "settled construction" placed by the judicial department of the state upon its own statutes. "In cases depending on the statutes of a state, and more especially in those respecting titles to land, this court adopts the construc-

tion of the state where that construction is settled and can be ascertained."

Polk v. Wendal, 9 Cr. 87.

The court defines it in another early case as "a fixed and received construction of their respective statute laws in their own courts."

Shelby v. Guy, 11 Wh. 361.

Instances in which the court refused to follow the last decision, on the ground that it did not embody the "settled construction," are to be found in

Rowan v. Runnels, 5 How. 135;
Pease v. Peck, 18 How. 598;
Gilpeke v. Dubuque, 1 Wall. 175.

These are all cases in which the decision not followed was one in which the statute in question was fully discussed and expressly construed by the state court. Nichols v. Burton can not be considered as in any sense a *construction* of a statute which is not alluded to in the opinion. That it embodies *settled construction* will hardly be contended for.

But the same question has been before the Kentucky court in the subsequent case of Gossom v. Badgett, 6 Bush, 97. That was a suit against two upon an alleged *joint* undertaking, and the court below rendered judgment against one of the defendants upon proof of a *several* undertaking. The Court of Appeals held, that while *a separate judgment* might be rendered against *one of several joint obligors under section 39 of the Civil Code*, yet the contract, whether joint or several, could only be proved as alleged, and hence reversed the judgment. Nichols v. Burton is not referred to, but the cases are inconsistent. In the later case the court gives effect to a statute which had been overlooked in the earlier. We submit, therefore, that Nichols v. Burton has been impliedly overruled. At any rate it has no claim to be considered the "latest settled adjudication."

In conclusion, it is well known in Kentucky that the case has never been looked upon as authority by the bar or followed by the inferior courts. It is doubtless for this reason that an opportunity to expressly overrule it has not been afforded the Court of Appeals.

But even conceding that this case has, by construction, repealed sec. 39 of the Code, yet we submit that this court will not, under its previous rulings, follow it if the effect will be to divest rights vested under that section. When the appellees took their judgment in the state court against Taylor and Shelby, they did not by the law then in force part with their recourse against Grigsby. Their right to that recourse was as clear as it could have been under any number of decisions, and this court has often decided that it will not, by following the last decision, divest rights acquired under earlier and settled decisions.

Ohio Life & Trust Co. v. DeBolt, 16 How. 431.
Pease v. Peck, 18 How. 598.
Gilpeke v. Dubuque, 1 Wall. 175.
Pine Grove v. Talcott, 19 Wall. 666.

It seems that rights acquired under a plain and unambiguous statute are alike inviolable.

Butz v. Muscatine, 8 Wall. 575.

But if the court is still of opinion that it must follow Nichols v. Burton, and hold that the judgment against Taylor and Shelby was a bar to a subsequent suit against Grigsby on the same cause of action, yet the plea was bad, because this suit was brought upon the same cause of action. No judgment was sought or obtained against him except for a delivery of the trust-fund. But for the faithlessness of the trustee, Grigsby would not have been a party to it. It was only sought to get the trust-fund into court, and distribute it among those entitled. Now, it is well settled, that if the creditor's debt be valid at the time of the creation of the

trust, it may still be enforced against the trust-fund, though his recourse against the person of the debtor may have become barred. Thus a discharge of the debtor by the statute of limitations does not affect the creditor's right to resort to the trust-fund.

Angell on Limitations, secs. 166-167, 468-469.
Daniell's Chy. Prac. 732.
Hill on Trustees, 263, 341.
Heckert's Appeal, 24 Pa. St. 482.

Upon the same principle the discharge of the debtor in bankruptcy will not bar the creditor's right to resort to the trust-fund.

Minot v. Thatcher, 7 Met. (Mass.) 348.

This last case has been frequently followed in the same court.

Willard v. Clark, 7 Met. 435.
Collister v. Hailey, 6 Gray, 517.
Richardson v. Thomas, 13 Gray, 383.

The principle of these authorities is, that where there is a trust-fund to be distributed, those may share in it whose debts were valid when the trust was created. The debtor's discharge is of no force. A recourse against him and a recourse against the trust property are two distinct things. Nothing but a satisfaction of the debt will defeat the creditor's recourse upon the trust property.

For yet another reason the plea is bad. The judgment, though a merger in law, is not in equity. It is now well settled that in equity partnership debts are not joint, but joint and several.

Story on Partnerships, sec. 362.
Lindley on Partnerships, p. 372.
Collyer on Partnerships (Am. Ed.) 1853, secs. 578-583.
Nelson v. Hill, 5 How. 127.

It is accordingly held, that a debt though merged at law is not extinguished, and will still support an adjudication in bankruptcy.

Re Griffith's, 3 DeG. M. and G. 174.

It was also held by Mr. Justice McLean, that though a partnership debt be merged in a judgment against one partner, a mortgage previously given by another partner to secure it may still be enforced.

Sedam v. Williams, 4 McLean, 51.

These authorities are perhaps opposed by the case of Penny v. Martin, 4 John. Chy. 566, where it was held that the court would not entertain a bill for relief by one who had taken judgment in ignorance of the fact that there were other partners not parties to his suit. The decision appears to be founded mainly upon the doctrine of relief against mistake, and in so far as it militates against the authorities above quoted I think is erroneous.

III.

In sustaining the exceptions and each of them to Grigsby's answer.

I submit that this assignment is not a compliance with rule 21 of this court.

The exceptions are six in number (Record, page 19), embracing matters of irrelevancy and impertinence as well as of insufficiency, and on them the whole case, as far as Grigsby is concerned, was tried. This point was decided by the Kentucky Court of Appeals under a statute relating to assignments of error similar in its language to rule 21 of this court. The appellant had moved for a new trial in the court below, assigning eight errors committed in the progress of the trial as the grounds of his motion. The order deny-

ing the motion was appealed from (under Kentucky practice), and the error assigned was, that the court below erred in overruling this motion; but the Court of Appeals held that the assignment was too vague to show the particular error complained of.

Maxwell v. Dudley, 13 Bush, 403.

As, however, the court may consider the assignment sufficient, it will be necessary to notice briefly and in their order each of these exceptions.

(1)

"The allegations of said answer, to the effect that defendant Grigsby was a nominal partner in the firm of Taylor, Shelby & Co., and that at the time of the purchase of the bills of exchange, mentioned in their bill, complainants did not know the fact that he permitted himself to be held out to the world as a partner, and did not purchase said bills on the faith of such holding out, are irrelevant and insufficient to interpose any bar to the relief sought by complainants."

This exception is not noticed in the printed argument of appellants' counsel, and is probably not relied on in this court.

It is sufficient to say, that while no proof was taken to show an actual partnership, enough appears taken upon other issues to estop Grigsby.

The formation of the new firm composed of Taylor, Shelby and Grigsby was advertised in a newspaper in Lexington on the 11th day of July, 1857, and for several days following. Record, 32 and 33. Grigsby says this publication was made with his consent, though he did not intend to become "actually a partner in the firm except as to strangers with whom new business might be transacted." Record, 26 and 27. His case in the court below was principally rested upon the allegation that complainants had no knowledge of his membership, and hence that he was not estopped as to them; but it was discovered during the trial that the very

bills sued on bore his name. Record, 26 and 27. These facts make Grigsby liable under the strictest limitations of the doctrine of ostensible partnerships.

Collyer on Partnership, 51, etc.
Story on Partnership, sec. 64, etc.
1 Greenleaf's Ev., sec. 207.
Dolman v. Orchard, 2 Car. & P. 103.
Benedict v. Davis, 2 McLean, 347.
Markham v. Jones, 7 B. Mon. (Ky.) 456.
Casco Bank v. Hills, 16 Me. 155.

(2)

"The allegations of said answer, to the effect that defendant's copartners in the firm of Taylor, Shelby & Co. undertook and pledged themselves to pay off its debts and hold the defendant harmless, are irrelevant and insufficient to interpose any bar to the relief sought by complainants." Record, 19.

This exception is also ignored in the printed argument, and is too plain for discussion.

(3)

"The allegations of said answer, to the effect that the judgment obtained in the Fayette Circuit Court against the defendants Taylor and Shelby operated as a merger of complainant's cause of action herein, are irrelevant and insufficient." Record, 20.

This matter had been previously set up by plea, and is discussed in this brief under the second error assigned. *Ante* page 5.

(4)

"That the plea of lapse of time and the statute of limitations embodied in said answer is bad, and interposes no bar to the relief sought." Record, 20.

The question presented by this exception appears to be insisted on, being discussed by counsel on page 57 of their printed argument.

The court will bear in mind that the proceeds of the

trust property were found in the possession of three persons, Grigsby, Grinstead, and Moore, of whom only the first named made any claim to it. Grinstead allowed the bill to be taken as confessed (page 15), and Moore answered, asserting no claim except for his fee for services rendered the trustee (page 24). Both surrendered the notes in their possession, and these notes, with their interest, amounting to $21,986.25, have been collected (page 120).

This constitutes about two thirds of the fund in court, and as to it the statute has not been pleaded.

The statute was pleaded by Grigsby in his answer (page 17), and was pleaded before the Master by Apperson, a creditor (page 43), but he is not a party to this appeal.

Mrs. Grigsby did not plead the statute, doubtless for the reason that the debts asserted by her were open to the same objection.

The statute then is only invoked by Grigsby to protect him against the claim of the creditors to the notes in his possession.

The debts asserted by the complainants were contracted by Taylor, Shelby & Co. in September, 1857, and Grigsby's assignment was made December 10, 1857.

The trustee from time to time made sales, but never settled his accounts; and finally, in May, 1870, he made the sale, the proceeds of which were sought to be subjected in this suit. Shortly after that time the notes in question were transferred to Grigsby, and in August, 1871, this suit was brought.

It is perfectly clear that the cause of action asserted in the bill did not accrue against Grigsby until he got possession of the trust-fund, a little more than a year before the suit was brought. No judgment was sought against him on the bills of exchange. He occupied precisely the same attitude to the bill that Moore and Grinstead did. The bill asked that he be enjoined from collecting the notes and required to deposit them in court, there to be collected and distributed. He had no adverse holding until he acquired the thing sued for, and

even then he seeks to show in his answer that he and his codefendants were acting as self-constituted trustees, and were going to distribute the money among the creditors under the trust deed. Record, 17. During the progress of the cause he even moved the court to make him an allowance for his services as trustee for the various parties under the deed of trust. Record, 29.

The nature of the suit is illustrated by supposing that the trustee had been alive when it was begun. It would only have been brought by him or in his name. In that event Grigsby, even if his holding was adverse, could not plead the statute of five years, because he had only had possession one year.

The court decided a similar question in Clark v. Clark, 17 Howard, 315.

In that case a bankrupt concealed the value of his assets, and bought the whole from his assignee for a trifling sum. The sale occurred in 1845, and in 1851 he collected a claim from the government which had been part of the assets. In the same year a creditor brought a creditor's suit against the bankrupt, alleging the death of the assignee and the foregoing facts, and praying the court to take possession of the sum collected by the bankrupt from the government and distribute it among those entitled. To this suit the limitation of two years in the bankrupt act was pleaded, and the court held, that no cause of action accrued against the defendant until he collected the money sued for, and that hence the statute did not apply.

It is clear, therefore, that Grigsby's plea of the statute was bad.

Mrs. Grigsby, the only other appellant, did not plead it, and it is doubtless sufficient to rest the argument here. Out of abundant caution, however, it may be well to pursue it further, and consider whether the trustee or any creditor (who in that respect could only exercise the trustee's right) could plead it. It is most clear that they could not. There

never was any disclaimer of the trust, nor any adversary holding by the trustee; and it is a familiar principle that where a trust is created for the benefit of creditors, subsequent lapse of time, while it may absolve the original debtor, does not take away their recourse upon the trust-fund.

Angell on Limitations, sections 166, 167, 468, 469.
Daniell's Chy. Prac. 732.
Hill on Trustees, 263, 341.
Burrill on Assignments, 551.

It has been held that seventeen years is too short a time to create a presumption of payment in such cases.

Adlum v. Yard, 1 Rawle, 163.

Upon the same principle, where one was adjudged an insolvent under a state statute, and afterward was discharged in bankruptcy, and after the discharge a creditor offered to prove a debt in the state court, it was held that neither the debtor's discharge in bankruptcy nor the expiration of the time within which an action must be brought against him, would operate as a bar to the proof of debt. The court said that the assignment in the state court created a trust which might be enforced by creditors notwithstanding the debtor's discharge.

Minot v. Thatcher, 7 Met. 435.

Followed and approved in

Willard v. Clark, 7 Met. 435.
Collister v. Hailey, 6 Gray, 517.
Richardson v. Thomas, 13 Gray, 383.

So any testamentary provision having the effect of a trust for the payment of debts suspends the running of the statute, and any creditor who had a valid debt at the time of the testator's death may obtain satisfaction out of the assets after any lapse of time.

O'Connor v. Haslam, 5 H. L. C. 168.

That the statute does not apply to express trusts appears to be tacitly conceded in the argument for the appellants; but it is contended that this is not such an express trust. They say that it is "a trust by way of hypothecation," and that to such the statute of limitations applies.

Deeds of trust in the nature of mortgages are unknown in Kentucky practice. In that state they have not superseded the ancient common-law mortgage as they have done in many of the other states. The distinction between such deeds and deeds of trust known as assignments for the benefit of creditors is very obvious. The one is a security to be enforced in the event the debt is not paid; the other is an absolute conveyance to a trustee in trust to sell and pay debts. In the one case there is an equity of redemption; in the other there is none. One is a conveyance with a defeasance; the other an absolute conveyance.

The deed in this case has all the features of an assignment and none of those of a mortgage. It does not provide that if the grantor does not pay on a day named, then the trustee shall sell. He is directed to sell absolutely. That no future day of payment was in contemplation is also shown by the fact that the debts provided for in the deed were mostly overdue and the grantor an insolvent.

That the equity of redemption is the distinguishing feature between deeds of trust in the nature of mortgages and deeds of trust absolute, or deeds of assignment, see

Ridgeway v. Stewart, 4 Watts & S. 383.

Woodruff v. Robb, 19 Ohio, 212.

The parties themselves treated it as an assignment, for the trustee converted the land into money, and it appears by Grigsby's answer that he was seeking to make some distribution of it among creditors. Even Grigsby lays no claim to it in his answer, except on the ground that the debts had been paid, and he was entitled to the surplus. Record, 17.

The learned counsel for the appellants appear also to rely

upon the dictum in the case of Vandever v. Hodge, 4 Bush, 540, which is italicised in their quotation from the opinion. That was an action to enforce a vendor's lien, and the decision was, that an action upon the purchase notes, being barred by limitations, the enforcement of the lien was barred, the court being of opinion that this was only an implied trust, to which the statute applied.

The dictum is as follows:

"Besides, had the trust been express, and not within the statute, still it could not be enforced as the mere incident to the debt, which is the principal, if the debt itself is barred by time."

We have seen that this declaration is opposed by all the authorities, and it is doubtful whether the counsel who cite it intend to rely upon it. It is enough to say that this court can not be called upon to follow it, because (1) it is a professed dictum, and (2) it is not a construction of the statute. The language itself is, "had the trust been express, and *not within the statute.*"

The case, even if it *decided* what is said in the part of the opinion quoted, would only be an enunciation of general principles, and not a construction of the statute.

Venice v. Murdock, 92 U. S. 494.

In the case of Clay v. Clay, decided since Vandeber v. Hodge, the Court of Appeals of Kentucky thus declare what I conceive to be the true rule:

"But in a case of express trust, where there is such a confidence between the parties that no action of law will lie, and a court of equity alone has jurisdiction, the statute will not constitute a bar."

7 Bush, 95.

(5)

"That said answer does not make sufficient discovery and answer to the matters set up in the bill, in that it does not show

which of the debts, intended to be secured by the deed of trust from Grigsby to Pindell, remain now unpaid."

(6)

"Said answer is insufficient, in so far as it seeks to set up a claim on behalf of the wife of the defendant Grigsby, or on behalf of the defendant Grigsby, as the agent of his wife, as a creditor by substitution or otherwise, under the deed of trust from Grigsby to Pindell." Record, 20.

The alleged error of the court in sustaining these two exceptions is not mentioned in the appellants' printed argument, and doubtless is not relied upon.

It is also alleged that the court erred

IV.

In overruling the exceptions filed by Gen. and Mrs. Grigsby respectively to the report of the Master.

It is provided in rule 21, sec. 4, of the rules of this court,

"If error is assigned to a ruling upon the report of a Master, the specification shall state the exception to the report and the action of the court upon it."

I submit that the above assignment is insufficient under this rule.

V.

In sustaining exceptions to the testimony of Taylor.

Section 6 of the same rule provides

"When the error alleged is to the admission or to the rejection of evidence, the specification shall state the full substance of the evidence admitted or rejected."

There is certainly here no such "plain error" as that this court will notice it without such an assignment as the rule requires.

VI.

In sustaining the Master's report.

VII.

In making distribution to complainants.

It is plain that these two assignments are both too vague to satisfy the requirements of the rule, and the questions intended to be raised by them have apparently been raised by other more specific assignments.

VIII.

In making distribution to Apperson.

Apperson was a creditor whose debt was allowed in the distribution. I do not appear for him, but suggest to the court that his name does appear upon the record as a party appellee.

IX.

In refusing to distribute to Mrs. Grigsby on account of the several claims paid by her which the Master had rejected.

Mrs. Grigsby proved a debt amounting in all to nearly fifty thousand dollars, consisting (1) of a debt due to a trustee for her separate use and secured by the deed of trust, (2) of sundry debts so secured and assigned to her by the holders, and (3) of sundry debts secured by the deed which had been *paid* by her.

The first two classes of claims amounting to $22,049.66 were allowed and the third rejected.

Mrs. Grigsby, by virtue of an antenuptial contract with her husband, and of the statutory proceedings before referred to in this argument, was the possessor of a large separate estate, and it is conceded on our part that the debts paid by her were paid with the proceeds of that estate.

I understand it to be conceded by her counsel that neither she nor her property was under any liability to pay those debts.

It seems also to be conceded that she took no assignment of the debts with which we are now concerned, and that there are no circumstances from which an assignment may be inferred. The language of her pleading is, "that at the special instance and request of defendant J. Warren Grigsby she has heretofore *paid off and satisfied*, out of her own separate estate, the debts and claims against said defendant set forth as debts of the first class in the deed of trust." Record, 52. Her proof is that she "paid off and fully discharged," and other synonymous expressions. Record, 55 and 56.

In order to enable one to sue on a debt which is payable to another, there must be some sort of assignment of the right of action. If that assignment is not made by the owner of the chose in action, it must be made, if at all, by operation of law.

This record, then, presents in its most naked form the question, whether a court of equity will create an assignment in favor of one who, being under no obligation to pay a debt, voluntarily does so.

The general principle under which such a cession of the creditor's rights and securities is presumed is well stated by the Supreme Court of Pennsylvania:

"The familiar doctrine of subrogation is, that when one has been compelled to pay a debt which ought to have been paid by another, he is entitled to a cession of all the remedies which the creditor possessed against that other. To the creditor both may

have been equally liable, but if, as between themselves, there is a superior obligation resting on one to pay the debt, the other after paying it may use the creditor's security to obtain reimbursement."

McCormick v. Irwin, 35 Pa. St. 111.

The doctrine of subrogation has been rigorously kept within these limits by the courts, and in no well-considered case has it been applied where the party seeking it was not in some form a surety. The rule is well expressed by Chancellor Walworth in the following extract:

"It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor as a matter of course without any agreement to that effect. In other cases the demand of a creditor, which is paid with the money of a third person and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished."

Sandford v. McLean, 3 Paige, 117.

The following is the head-note of a decision of the Court of Appeals of the same state:

"One who pays a debt for which he is not personally bound, and which is not a charge upon his property, is not entitled to be subrogated to a lien which the creditor had upon the estate of the debtor."

Wilkes v. Harper, 1 Coms. 586.

It is also the rule of the civil law, from which the whole doctrine is derived, that a payment by a volunteer "will extinguish the debt and the mortgage given to secure it, and the claim for reimbursement will constitute the party who paid an ordinary creditor of him for whose benefit the payment was made."

Nichols v. His Creditors, 9 Rob. 476.

It is held in Pennsylvania that a junior judgment creditor who pays off a prior judgment lien to avoid a sacrifice of his own is entitled to subrogation, no intermediate lien having attached, but the court say in the course of the opinion:

"It will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a demand against a common debtor."

Mosier's Appeal, 56 Pa. St. 76.

The rule has been applied in many cases of hardship where debts have been paid by parties supposing that they were bound.

Thus a tax collector, who paid to the state taxes in advance of collecting them, is not subrogated to the state's lien upon the land.

Wallace's Estate, 59 Pa. St. 401.

So an administrator who out of his own funds paid off a mortgage debt of his decedent can not be subrogated to the mortgage lien.

Shinn v. Budd, 1 McCarter (N. J.) 234.

So a purchaser at a void execution sale, whose money is applied to the satisfaction of the judgment, is nevertheless a volunteer, and not entitled to be subrogated to the judgment lien.

Richmond v. Marston, 15 Ind. 134.

These principles are applied in all cases where money is furnished by a third person to pay off an incumbrance. He is treated as a volunteer, and equity will not subrogate him to the creditor's rights, but leave him to his own contracts. Thus in the case of Gadsden v. Brown, Speer's Equity (S. C.) 37, one who had furnished money to pay off a mortgage and taken a mortgage to secure himself sought to be subrogated

to the lien of the first mortgage in order to overreach an intermediate lien.

The language of Chancellor Johnson, which was adopted by the Court of Appeals, is worth quoting:

"The doctrine of subrogation is a pure, unmixed equity, having its foundation in the principles of natural justice, and from its very nature never could have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound, and as far as I have been enabled to learn its history, it never has been so applied. If one with perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those who were already bound or who could not but choose to abide the penalty. . . . But I have seen no case, and none has been referred to in the argument, in which a stranger, who was in a condition to made terms for himself and demand any security he might require, has been protected by the principle."

That one furnishing money with which to discharge a lien is not thereby subrogated to the lien-holder's rights, and that without an assignment by the latter the lien is lost, is held in the following cases in addition to those already cited:

Banta v. Garmo, 1 Sand. Chy. 383.
Eastman v. Plumer, 32 N. H. 238.
Swan v. Patterson, 7 Md. 164.
Hunter v. Richardson, 1 Duvall (Ky.) 247.
Pelton v. Knapp, 21 Wis. 63.
Virginia v. C. & O. Canal Co., 32 Md. 501.
Wiley v. Boyd, 38 Ala. 625.
Webster's Appeal, Supreme Court of Pennsylvania, March 12, 1878, reported in "Weekly Notes of Cases" (pub. by Kay & Bro., Phila.) vol. 5, p. 486.

Tested by the foregoing principles, the cases, now of frequent occurrence, where money is furnished by a third person, to be used in taking up the coupons of railway bonds, are easy of solution. If there is any assignment, actual or constructive, the lien subsists, and this assignment must be made by the creditor, for the debtor has no right in the coupons except to pay. If there is no assignment, the lien is gone, for equity will not create one for the protection of a volunteer, and he becomes merely a general creditor of the debtor.

The contrary was held in Miller v. Rutland & Wash. Railway Co., 40 Vt. 400, but the decision is opposed to all the foregoing authorities, and, as far as my investigation goes, stands alone. It is also opposed by the well-considered case of Union Trust Co. v. Monticello & Port Jervis Railway Co., 63 N. Y. 311, in which the facts were precisely similar. The case of Haven v. Grand Junction, &c., 109 Mass. 88, cited by counsel in this case (p. 45 of argument) as sustaining it does not do so. There was no subrogation there, but on the contrary, the party seeking it was held a mere general creditor, and the coupons held by him were adjudged to be "a charge against such funds in the hands of the trustees as may remain after the payment of the other mortgage creditors and other claims allowed by the Master."

The case of Swift v. Kraemer, 13 Cal. 526, and the other cases from the same court cited in that opinion, militate against the views contended for in this argument, though the court does not place them upon the ground of subrogation.

They decide that where one furnishes money to pay off an old mortgage and takes a new mortgage to secure himself, causing the old to be canceled, equity will treat the new mortgage as an assignment of the old so as to overreach an intervening right of homestead. It is sufficient to say, that these cases are opposed to all general principles and in conflict with all the authorities. See cases cited on pp. 21 to 23, *ante*.

Upon page 41 of argument for the appellants, I find the statement that payment upon an agreement with the debtor to assign the security will operate as an assignment though the creditor does not assent to it.

It seems to me that the statement of this proposition shows its fallacy. In order to a valid assignment there must be something to assign and somebody to assign it. The debtor does not own a debt which he is bound to pay, and he can not assign that which he does not own. His only right is to pay the debt. That right he can part with. He can authorize another to pay for him, and such a payment will be a valid payment and will bind the debtor to refund, but it can not place the party paying in any better situation than the debtor. "It results, from what has been said, that as a stranger can not extinguish a debt without the debtor's assent, so he can not purchase it without the creditor's. If neither condition is satisfied, the act is null and does not confer a right or extinguish that which existed previously."

2 Leading Cases in Equity (4th Am. Ed.) 289.

Mr. Grigsby, then, could not confer more than he himself had, namely, the right to pay the debts and an interest in the surplus.

That no contract with the debtor can operate as an assignment of the creditor's lien is implied in all the cases I have cited and expressly decided in several of them.

Thus, in the case of Pelton v. Knapp, 21 Wis. 63, a third person furnished money to the debtor with an express agreement that he was to have an assignment of the mortgage. The debt was accordingly paid, and some time afterward an assignment was taken from the creditor. The court held that the agreement with the mortgagor did not operate as an assignment, that the debt was extinguished by the payment, and hence that the subsequent assignment by the mortgagee was void.

So in the case of Eastman v. Plumer, 32 N. H. 238, there

was an express agreement to assign made by the debtor, which was held inoperative, the creditor being no party to it.

In the Union Trust Co. case, 63 N. Y. 311, and Virginia v. C. & O. Canal Co. 32 Md. 501, there was an actual assignment of uncanceled coupons *by the mortgagor*, which was held in each case to carry no lien.

The same doctrine was held in a very hard case in Hunter v. Richardson, 1 Duvall, 247.

The latest case on the subject is Webster's Appeal, decided by the Supreme Court of Pennsylvania March 12, 1878, and reported in "Weekly Notes of Cases" (Kay & Bro., Philadelphia), vol. 5, p. 486.

In that case Banker had indorsed for Adams, who confessed judgment in his favor as a security. The debt matured in Banker's absence, and Adams being unable to pay it, procured Baur to do so, agreeing to give him an assignment of the judgment to secure him. About two months afterward Banker did actually assign the judgment to Baur, other judgments having been obtained in the mean time.

The court held that Banker was a volunteer, and not entitled to subrogation, that Adams's agreement to assign was nothing, and that the lien of the judgment was discharged by the payment of the note secured by it.

It can hardly be necessary to argue that the complainants in this case occupy as favorable an attitude to the trust-fund as if they had acquired a lien *after* the trust deed was made but before Mrs. Grigsby intervened.

The case of Dodge v. The Freedman's Bank, 93 U. S. 380, appears from the syllabus to conflict with the foregoing authorities, but it is evident from the opinion that the court considered that the circumstances showed a virtual assignment by the collecting bank, which was held to be the creditor's agent.

In the case of Ketchum v. Duncan, 96 U. S. 659, it seems not to have occurred to court or counsel that there was any

subrogation or any assignment by the debtor's act, and the case turned exclusively upon what amounted to a sale by the creditor.

In the case at bar that question does not arise. The paper paid off was not produced in the case. The allegation and proof is that Mrs. Grigsby "paid off and extinguished" it, and the claim in her pleading is only that she "is entitled to be substituted to the rights of the original creditors and holders." Record, 52.

Even as to the alleged agreement to assign by the husband, there is no proof in the record. The debts were paid during the war in his absence, and the most Mrs. Grigsby can say in her deposition is, that she paid them to save her husband's credit, and with the expectation of being reimbursed by him. Record, 107 to 110.

It is also argued by the learned counsel for appellants (p. 40) that Mrs. Grigsby is entitled to prove against the fund in court the debts paid by her on the ground of payment *supra protest*. The fatal defect in the argument is that the fact does not sustain it. The record does not show that she paid *supra protest*. It is well settled that such a payment, in order to entitle a stranger to sue on the bill, must be made after protest, and must be accompanied by a formal statement of the fact of payment, by whom and for whose honor, and that this statement be recorded by the notary.

Byles on Bills, chap. 21, p. 260.

Gazzam v. Armstrong, 3 Dana (Ky.) 556.

Aside from this, the doctrine is a mere modification of the common-law rule that a man can not pay the debt of another without that other's consent. It merely dispenses with the debtor's request. It puts the creditor in no more favorable position than if the request had been made. He is none the less a volunteer because he pays commercial paper. He is not bound to pay the bill, and not being bound, is a volunteer, and not entitled to subrogation.

No case has been cited, and I believe none can be found, in which a stranger paying *supra protest* has been subrogated to any lien held by the creditor.

It is also asserted that the court erred

X.

In overruling the petition for rehearing filed by Mrs. Grigsby.

No appeal lies from such an order.

Cambuston v. United States, 95 U. S. 285.

XI.

In charging any part of the fee allowed complainant's counsel upon the portion of the trust-fund distributed to her.

It is the settled English practice in creditor's suits to allow the petitioning creditor his counsel fees, or, as it is there termed, "his costs as between solicitor and client."

3 Daniell's Chy. Prac. (1st Am. Ed.) 1579–85.

It is certainly equitable that where the rules of equity require a plaintiff to prosecute his suit for the benefit of others, they should defray their proportion of the expense.

Mrs. Grigsby seeks to escape that, in this case, on the ground that she would have gotten more from her husband than she has received from the court. It is doubtful whether that is true, as the notes held by her husband have so far produced but $11,585.25 (Record, 120), and she has withdrawn from court $21,753.05 (Record, 130). But even if her husband had held all the notes, the court can hardly be asked to indulge the conclusive presumption that he would have paid over the proceeds to his wife. The circumstance of

his being the husband of the principal creditor certainly can not alter the rule of practice.

As to the amount of the fee allowed, this court will doubtless not interfere with the action of the circuit judge, who had personal knowledge of the value of the services.

Tender.

It only remains to notice one alleged ground of reversal which is not embraced in any of the assignments of error.

It is that the refusal of the complainants to accept an alleged tender made to them by E. H. Taylor discharged Grigsby.

The plea of tender, which appears on page 23 of the record, is plainly insufficient for many reasons, of which the most conspicuous are that it fails to show that the defendants are still ready to pay (Bissell v. Hayward, 95 U. S. 55), and that a tender to an individual in his own notes (Cary v. Bancroft, 14 Pick. 315,) or to a bank in its notes is not good (Hallowell v. Howard, 13 Mass. 235).

But Grigsby also failed to sustain it by proof. The plea (in form an amended answer) was filed January 12, 1872 (Record, 23), and the replication June 19, 1872 (Record, 28). No proof was taken within the time allowed in equity rule No. 69, and on January 4, 1873, a motion was made to extend the time for taking proof, which was denied, and in the reference to the Master which followed he was especially directed not to hear any proof "respecting the alleged tender." Record, 29.

The record does not contain any evidence of cause shown upon the motion to extend time; but if it did the matter is in the discretion of the circuit court. Rule 69. In the course of examination of the witness Taylor before the Master, questions were asked him respecting the alleged tender, but this

portion of his testimony was excepted to (Record, 118), and the exception sustained (Record, 123). There is therefore no evidence on the subject in the record.

All which is respectfully submitted to the court by

W. O. HARRIS,
Counsel for Appellees.

Supreme Court of the United States.

SUSAN P. GRIGGSBY ET AL., APPELLANTS,
vs.
C. W. PURCELL & CO. ET AL., APPELLEES.

BRIEF FOR APPERSON.

Appellants' ninth assignment of error is that the circuit court erred in making distribution to Apperson. The proofs in regard to Apperson's claim, as correctly stated in the commissioner's report (R. 45), show beyond question that it comes exactly within the description of claims provided for in the fourth class of the assignment. The appellants' brief in substance concedes this, especially on its last page, where in setting forth the decree that in the opinion of its author ought to be rendered in the case, it says that after payment to Mrs. Griggsby's so-called first class claims in full, the fund ought to be appropriated "to R. Apperson, jr., the only fourth class creditor in existence."

It is inferred, therefore, that the error intended to be alleged is that the money paid to Apperson in the distribution made below ought to have been paid to Mrs. Griggsby on those claims of hers which were rejected, and that the question upon this assignment is whether those claims were properly rejected.

The rejected claims are (R. 37–39) those which were not assigned to her, and are as follows:

An acceptance of Griggsby for $5,000, held by the Deposit Bank of Lexington.

A similar acceptance for $2,500, held by the Commercial Bank of Kentucky.

A note of Griggsby's to H. H. Walter, for $837.

A long list of small debts stated in commissioner's report (R. 38–9), aggregating $2,440.31.

A note to Solon Craig for $1,830.

An open account in favor of J. P. Fisher for $700.

In the statement of her claims before the commissioner she alleges (R. 52) as to these, only that "she has paid off and satisfied" them "out of her own separate estate," and that the payments were made "at the instance and request of J. Warren Griggsby." She asks not for the payment of the original debts thus discharged. She neither files the evidence of them, nor accounts for their non-production. But seeks payment of the amount advanced to discharge them by being substituted to the rights of the original holders under the deed of trust. The first three claims above mentioned are specifically described among the first class of debts provided for in that deed. It is claimed that the others are also debts provided for in that class in the following words: "An amount of about thirty-five hundred dollars due by said party in small sums to various persons in various places in Kentucky, principally current accounts of the year."

This description is so indefinite as to be void for uncertainty. Its governing word is the indefinite article. It does not profess to provide for all the debts of the assignor of the character described, but only "an amount" of them without a clue to indicate which of them constituted the amount. Even the amount is indefinitely stated as "*about* thirty-five hundred dollars." It is claimed that he owed debts answering the description to the amount of about $5,000. There could be no better illustration of the uncer-

tainty of the clause than the fact that there being nothing to show which were intended, a claim is asserted for all. Nothing could be more uncertain than what was intended by the words "small sums."

But if the clause was sufficiently certain to be enforced, the proof does not bring one of the claims within its provisions.

This sort of description opens so widely the door for fraud and favoritism that at least no claim should be allowed under it that is not proved to come clearly within its provisions.

There is no proof that any of these debts, except that to Fisher, existed at the time of the assignment. The only proof in regard to them is to be found in Griggsby's affidavit (R. 58) and Mrs. Griggsby's deposition (R. 109), and they disagree. He says he "*paid off* and *fully discharged* them," with money furnished by her from her separate estate. She says she paid many of them herself during the war when, as the proof shows, he was absent from home, and that the others were paid after the war. There is not a thing in the testimony from which it can be inferred that these debts, except Fisher's, were not all contracted after the assignment. The probability from the time of payment is the other way. It is true that it is alleged in Mrs. Griggsby's statement of facts and claims (R. 53), after the statement of the list of small claims, "The foregoing claims were paid prior to the 27th day of March, 1858," but before she gave her deposition she had discovered that this was a mistake and testified as above. It is not and cannot be claimed that the omission to deny this allegation is an admission of its truth. Though it is sometimes said that a state of facts carried into the master's office is in effect a pleading, yet they are not intended to make issues, but only to notify the opposite parties of the facts as to which evidence is to be adduced.—(Daniel's Chy. Prac., ed. 1865, p. 1186.) An admission before the master can only be made in answer

to interrogatories.—(Id., 1176.) The state of facts cannot even be considered as evidence.—(Id., 1205–6.)

It not only is not in proof that these debts existed at the date of the assignment, but there is nothing to show that the holders of them were or resided at that time in Kentucky. And yet the clause relied on provides only for debts due to such persons. So, too, the clause in question provides only for an amount, principally current accounts, for the year, and there is not a particle of proof that any of the debts mentioned, except Fisher's, were accounts at all, and none that any of them were either accounts of that year, or current accounts. So, too, if any meaning can be attributed to the words, "small sums," it must be sums small in comparison with the other debts in the class which had been specially described. The last of these previous to the clause in question was for $837. These words, therefore, cannot be so strained as to include the debts to Craig for $1,830 and Fisher for $700, even if they came within the other terms of the description. None of these claims, therefore, can be considered as having ever been provided for in the assignment. These debts appear from the affidavits of Shelby (R. 58) and Fisher (R. 59) to have been paid by Mrs. Griggsby.

As to the other three debts in controversy, that to Walter appears, from his affidavit (R. 57–8), to have been also paid by Mrs. Griggsby.

Griggsby says in his affidavit (R. 55) that he "paid off and fully discharged" the acceptance for $5,000 held by the Deposit Bank of Lexington. But he must have meant by this, if he really meant that the payment was his personal act, that he paid the note or other paper of Mrs. Griggsby, with which, as she testifies (R. 108), she took up this acceptance in order to relieve Col. Hart and Mr. Shelby, who were endorsers on it.

As to the only remaining debt held by the Commercial Bank of Harrodsburg, Griggsby makes the same affidavit in the same words which he made to the claim held by the De-

posit Bank of Lexington, (R. 55,) and to the list of small debts (R. 58). In regard to all these his statement conflicts with that of Mrs. Griggsby, who testifies that she paid them all (R. 108–9), and in regard to the other two debts, with such particularity that it cannot be doubted that she is correct. This discrepancy is easily accounted for. Col. Griggsby did, as her agent, pay several of the debts in the first class. When he gave his deposition there was nothing to lead him to suppose that it was a matter of any consequence one way or the other whether they were paid by him or her. A long time had elapsed since the payments had been made. The record shows at several points that his recollection was not very exact. Upon this point there was nothing to refresh it, and without reflection he took it for granted that he had paid all.

It is not believed that the court will, upon the evidence, hesitate to hold that Mrs. Griggsby paid all the debts in controversy. And as she testifies that she only attended to business in his absence during the war, and to none since that time, (R. 119,) the court will also find that these debts in controversy were paid before the close of the war, except some undesignated ones of those in the list of small debts, which she says (R. 109) were paid after the war.

None of these claims, then, can derive any help from "the understanding" and "assurance" that she "was to be and would be reimbursed out of his property which he had conveyed in trust," on and with which, as she testifies in answer to question two, on page 110, she, "*after the war*," gave him the most unlimited authority to use her means in paying his debts.

In order to get any benefit from this understanding, whatever it may mean, the burden of proof is upon her as to each debt, to show that it was paid after that was made. As we have seen, she shows the contrary as to all except a part of the small ones, and as to these her proof is insufficient because it does not show which of them were so paid.

As to the debts paid by her during the war, she only claims in her re-examination (same page) "that he knew of those debts before he left, and desired me to have them paid out of the stock and produce of the place," and that she "paid them with the confident *expectation* that she would be reimbursed," without a word as to how she expected to be so.

There is no word to show that she expected to be so by being subrogated to the claims of the creditors. On the contrary this is inconsistent with the principal purpose expressed by her, of preventing her husband from having to go into bankruptcy, or her secondary purpose of enabling him to save the western property in the growing city of Chicago, which she doubtless regarded as of great prospective value. The payment of the debts of Taylor, Shelby & Co., for which he was bound, was as necessary for these purposes as were his individual debts.

That part of the appellants' brief relating to the claims in controversy seems to seek to establish three propositions of law, neither of which would apply to the facts of this case if it was true. And neither is believed to be true. They are as follows:

First. That if a trustee apply the trust fund to the payment of his own debt, and the creditor discharges it, a court of equity will reanimate the debt in order to follow the trust fund into it.

Second. That if one person voluntarily pay the debt of another with the intention of being subrogated to the remedies and securities of the creditor, he will be so subrogated irrespective of the intention of the creditor; and—

Third. If such payment is made pursuant to a contract between the debtor and the payee, to that effect, the payee is more certainly entitled to the subrogation.

The first clearly does not apply to this case, because Col. Griggsby was not Mrs. Griggsby's trustee, and because the payments were not made by him, but by her.

The second, because there is no evidence to show that she made the payments with any intent of purchasing the debts or being subrogated to their securities, but, as has been shown, all the evidence there is tends to show the contrary.

The third, because there is no evidence to show that any agreement of any sort had been made when the debts in controversy, except the undesignated portion of the list of small ones, were paid. In fact, the agreement which is alleged to have been made after the war (R. 110) was not that the debts should be assigned to her, or that she should be subrogated to the remedies of the creditors, but that she should be reimbursed out of the property. They might have intended that this should be done by subrogation, but they might as well have intended that this should have been done out of the large surplus which they then had every reason to suppose would be coming to him after the payment of all the debts provided for. And the last hypothesis only is consistent with the purpose which induced her to pay the debts, as she declares in the very answer in which she states the agreement.

But there is a fatal error in each proposition, even if it applied to the facts. Each entirely ignores the indubitable ownership by the creditor of the debt which has been incurred to him, subject only to the limitation that the debtor may pay it at maturity, and probably that the creditor cannot extinguish it without the debtor's consent. With that consent he may, if he be acting in good faith certainly, extinguish it. If there be a surety, he will by doing so release the surety, but still he may do it. No one can compel him, against his will, to transfer it. Not the debtor, for he has only a right to pay. Not the surety, if he chooses to discharge the surety's liability. No one else, because he is sovereign master of his own.

Whenever, then, any one claims to enforce the debt he must show that the creditor has of his own will assigned the debt to such claimant, either directly or indirectly.

If, therefore, the creditor and debtor concur in extinguishing the debt, it is not perceived how any one else can prevent the act from taking effect, even though the debtor, with the knowledge of the creditor, misapply the money of another to induce the creditor to join in the act. The act of extinguishing the debt concerns these two alone. They may do it without any payment at all, still more may they do it upon a contingent payment. The owner of the money might recover it from the creditor, but this could not reanimate the debt. It had been extinguished by two parties who had full power to extinguish it, neither of whom had defrauded the other.

Much less could the debt be reanimated after extinguishment by these parties when neither was acting in bad faith to any one. And in this case there is no pretence that either party was.

So, when, as has been shown to have been the fact in this case, the money is paid to its owner upon the request of the debtor, or by contract with him, after the maturity of the debt it may be extinguished without the assent of the creditor, because the debtor then has a right to pay, and he may do it as well by his agent as by himself. But the title to it cannot be taken from the owner and transferred to any one without his consent, any more than that of any other of his property. He may give or he may refuse this consent impliedly as well as expressly. In a large majority of cases his only interest is to get the money for his debt, and he is willing to extinguish or assign it as the payer may prefer. And, therefore, slight circumstances are sufficient to justify an implication of such an assignment by a third party. The surrender of the evidence of the debt, in a condition that it may pass by delivery, is in such a case all-sufficient for this purpose, as shown by this court in the masterly opinion in the case of Ketchum vs. Duncan, 6 Otto, 659. But it lays upon any party claiming such an assignment to show these slight circumstances.

In this case there is not a particle of proof of any thing of the kind. The only debt of which the evidence is produced, has endorsed upon it a receipt in full, which certainly cannot be considered as even a slight circumstance from which to imply an assignment, for it clearly indicates the contrary. The evidences of the other debts must be presumed to have been still more certainly cancelled or the claim would have been made on them.

It is not contended that the words "paid and fully discharged," used in the state of facts and claims, and in the depositions of both Colonel and Mrs. Griggsby, are conclusive against her, but in the absence of any circumstance in her favor they are very significant; especially so that they were used when the payments were made, and there was nothing in them certainly to lead the creditors to suppose that in receiving the money they were assigning the debts. And if, as must be inferred, from the non-production of the written evidences of the debt, the evidences were cancelled by receipting in full or otherwise, there is no possible ground on which it can be said they were assigned.

There could be no better proof of the erroneousness of the three propositions than the manner in which they are treated in the brief which substantially, though not expressly, propounds them. In connection with each, other propositions of law, which no one would dispute, are demonstrated with much research and citation of authority, as if they were premises from which those contended for are conclusions. But there is no attempt to point out the logic of the conclusion nor to cite authority to show that it is such.

The propositions thus established, apparently as premises of the first sylogism, are, first, that possession by the husband of the wife's separate property is no evidence of a gift of it by her to him; second, that if a trustee misapply the trust fund to the purchase of property in his own name, a court of equity will follow it into the property so long as

that *exists*, either in the name of the husband or his assignee with notice.

But it is not shown, by authority or otherwise, how it follows from this that, if an agent, who is not technically a trustee, with the approbation of the principal invest the money of the latter in the purchase of property for himself, a court of equity would hold that the principal could follow his money into the property. Much less is it shown how he could follow it into property which has in any way become extinct.

But the brief does cite the case of Winder vs. Diffenderfer, 2 Bland., 198, in which it was held in an elaborate opinion, by a judge of high authority, that this cannot be done even when the trust fund has been misapplied by a technical trustee. The brief attempts to evade the force of this decision upon the ground that in the same case it was also held that the same question had been in another case adjudicated between the same parties, and that therefore it was unnecessary to consider this one. If the question in this case had been as to whether it had been previously adjudicated between these parties, they would with the same force have contended that the question as to the power of the court to raise the dead having been decided, it was unnecessary to decide that as to the *res adjudicata*, and thus this very well considered case could be no authority upon either question.

This brief must be left here incomplete for want of time. This is regretted the less because the remaining questions are so fully and ably treated in the brief for the appellees, Purcell & Co.

H. C. PINDELL,
for Apperson.

Supreme Court of the United States.

No. 136.

J. WARREN GRIGSBY and

SUSAN P. GRIGSBY, - - *Appellants*

vs.

C. W. PURCELL, and others, - - - *Appellees*

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

W. O. HARRIS, Counsel for Appellees.

Courier-Journal Print.

Supreme Court of the United States

No. 136.

J. WARREN GRIGSBY AND
SUSAN P. GRIGSBY, - - *Appellants.*
vs.
C. W. PURCELL, AND OTHERS, - *Appellees.*

Brief in Support of Motion to Dismiss Appeal.

The ground of the motion to dismiss is, that parties not united in interest can not unite in an appeal.

That the parties appellant in this case are not so united will appear from the most cursory examination of the record.

This suit was brought by Purcell and others (the appellees) claiming to be creditors under a certain deed of trust or assignment from J. Warren Grigsby (one of the appellants) to R. Pindell, the latter being dead at the time of the institution of the suit. Grigsby and two others were made defendants, and the bill alleged that they wrongfully held possession of the trust fund, and prayed the court to appoint a receiver and take possession of and distribute it. [R. pp 1 to 4]. Grigsby alone resisted, and filed a demurrer [p 10] plea [p 13] and answer [pp 16, 23], all of which were successively adjudged bad, the last upon a series of exceptions embracing all his defenses [pp 19, 23-4, 28-29]. The bill was taken for confessed as to him [p 28] and the cause referred to the Master to report the amount due the

complainants and all other creditors under the deed of trust and to distribute the fund [p 29].

Among other creditors who appeared under the decree thus obtained was Susan P. Grigsby, one of the appellants. She was the wife of her co-appellant, but he did not unite with her in her claim before the Master or in any subsequent pleadings or proceedings. On the contrary she avers in her "state of facts" that she has been empowered to act as a *feme sole*, under a statutory proceeding brought for that purpose, and she avered that "she now, therefore, claims the right to assert her foregoing claims in her own name and right and to collect and receive the same" [p 54]. With this pleading she filed a copy of a decree of the Lincoln Circuit Court, empowering her "to make contracts, to sue and be sued as a *feme sole*, etc." [p 55]. This decree was founded upon an act of the Legislature of Kentucky, approved February 14, 1866. [Acts of 1865-6, p 36].

A large portion of her claim was allowed, and in the decree of distribution she is allowed to withdraw from court the amount allowed her as though she had been an unmarried woman [p 128].

Whatever may have been the merits of her claim, she asserted it in the Court below, and must assert it here, in her own right and as a *feme sole*, and her relation to the parties and the record is the same as that of any other creditor. She is, therefore, not only not united with her husband in interest, but is as hostile to him as are the appellees, or any other creditors who proved debts under the decree.

He speaks in his answer of "controlling" a claim for his wife as her agent; but she does not assent to this control, and he does not profess a holding friendly to creditors, but pleads limitation and adverse possession and resists them at every step.

The question is, can two parties not united or even antagonistic in interest, prosecute a joint appeal or writ of error? Can there be any decree or order which they have a joint interest in reversing?

The converse of the proposition, namely, that a several appeal can not be prosecuted from a joint judgment, has been decided by this Court in many cases of which the latest are

Massina vs. Cavazos, 6 Wall, 358.
The Protector, 11 Wall, 82.
Simpson vs. Greeley, 20 Wall, 152.

We conceive it to be equally as well settled, though not as yet decided by this Court, that parties severally affected by a judgment or decree can not prosecute a joint writ of error or appeal from it.

Bacon's Abridgement, Title Error B.
Howie vs. State, 1 Alabama, 120.
Farr vs. State, 6 Alabama, 794.
Callaghan vs. Carr, 1 A. K. Marshall (Ky.), 22.
Campbell vs. Johnston, 4 Dana (Ky.), 178.

That the proper practice in such cases is to prosecute separate appeals or writs of error, and that no appellant or plaintiff in error can assign error prejudicial to another, see

Sherley vs. Lunenburg, 1 Mass., 379.
Shaw vs. Blair, 4 Cush., 97.
Jacqueth vs. Jackson, 17 Wend., 434.

That the practice on writs of error and appeals is the same in this Court, see

Revised Statutes, section 1012.
Massina vs. Cavazos, 6 Wall, 358.
The Protector, 11 Wall, 82.

The difficulty of proceeding in a joint appeal by parties not united in interest is illustrated in this case. The errors prejudicial to Grigsby, if any, must have been committed in overruling his demurrer, adjudging his plea and answer insufficient, and taking the bill for confessed against him. His co-appellant can not complain of these orders but claims under them. In the same manner while she may be aggrieved by the subsequent report of the master and decree excluding part of her claim, he

can not complain of it because it benefits him by increasing his chances for a surplus.

It results from the foregoing that the defect is one of substance and not of form, and, consequently, can not be cured by amendment under the Act of 1872, section 1005 of the Revised Statutes.

It seems equally clear that J. Warren Grigsby's death, which has occurred since the appeal was prayed, can not affect the question. If he was properly joined his personal representative is a necessary party and must be brought before the Court, (Callaghan vs. Carr, 1 A. K. Marshall, 22), and if not the appeal itself is defective.

We ask that the motion be sustained and the appeal dismissed.

Supreme Court of the United States

SUSAN P. GRIGSBY, ... Appellant,

VERSUS

C. W. PURCELL AND OTHERS, . . Appellees.

BRIEF FOR APPELLEES ON OBJECTION TO JURISDICTION.

When this cause was called for hearing on the 21st of January, objection was made to the jurisdiction of this court on the ground that the record was not filed in time, and, after argument, the Chief Justice announced that the court was of opinion that the objection was well taken. Time was, however, given the counsel for the appellants, in order to enable him to examine more fully the record in the court below, and to bring up any portion of it which might have been omitted. I have since been informed by the learned gentleman that his search has proven fruitless, but that this court has, upon his application, consented to rehear the question decided, upon printed briefs.

I understand it to be now conceded by counsel that the record is out of time, but it is contended that the defect has been cured by the appearance of the appellees by counsel in this court.

In the following cases this court has decided that the acts of congress conferring appellate jurisdiction upon it in effect require the record to be filed at the term of this court next succeeding the granting of the appeal, and that a failure to comply

with this requirement is not only an irregularity, but is fatal to the jurisdiction.

Steamer Virginia v. West, 19 How. 182.
Mesa v. The United States, 2 Black, 721.
Castro v. The United States, 3 Wall. 46.
Edmonson v. Bloomshire, 7 Wall. 306.
The Lucy, 8 Wall. 307.

It has also been decided that the writ of error and citation must be made returnable to the next term, and to the first day of that term, and if made returnable to a succeeding term, or to another day in the same term, the writ was void, and conferred no jurisdiction.

Villabolos v. United States, 6 How. 81–90.
United States v. Curry, 6 How. 112.
Insurance Company v. Mordecai, 21 How. 195.

In all these cases the fact of filing the record is treated as jurisdictional, and, in the two last, it was expressly decided that, being jurisdictional, it could not be waived in any manner. In *Edmonson v. Bloomshire* the point was suggested by the court after the case had been argued upon the merits, the court saying that "it has never hesitated to act on this rule whenever it has appeared from the record that the case came within it, although no motion to dismiss was made by either party. In fact, treating it as a matter involving the jurisdiction of the court, we can not do otherwise." In "The Lucy" the question was still more sharply presented, the case being brought to this court "by consent of all parties in interest." The court, on motion, dismissed the appeal on the ground that consent could not confer jurisdiction. The case of Wood v. Lide, so much relied on by my learned opponent, was cited by Mr. Durant in his argument in support of the jurisdiction.

I submit that that case and Pickett v. Legerwood, 7 Peters, 144, holding that the failure to file the record at the first term is cured by appearance, have been overruled by the later cases just

cited. They are also in conflict with the subsequent case of United States v. Yates, 6 How. 605, in which the effect of an appearance is discussed and decided. In that case the counsel of the appellees asked leave to withdraw his appearance in order that he might take advantage of certain irregularities in the appeal.

The court, by Chief Justice Taney, said:

"Upon the affidavits filed, the court will permit the attorney who has appeared for the appellees to withdraw his appearance. But this leave will not authorize a motion to dismiss for want of a citation, nor for mere irregularity in its service, provided the appeal is in other respects regularly brought up and authorized by law. The citation is merely notice to the party, and his appearance in person or by attorney is an admission of notice on the record, and he can not afterward withdraw it. But the appearance does not preclude the party from moving to dismiss for the want of jurisdiction, or any other sufficient ground, except for the one above mentioned; and a motion of that kind is, in the practice of this court, usually and most properly made by the attorney after his appearance is entered on the docket."

It is certainly difficult to perceive upon what ground an appearance is a waiver of any thing except of a notice to appear.

The question resolves itself into this: Should the objection have been made at the time of entering the appearance, or can it be made afterward? In other words, can defenses be made out of the formal order of pleading? The obvious answer is, that in this court there are no formal pleadings on the writ of error, and consequently no rules as to the order in which defenses shall be made.

Brooks v. Norris, 11 How. 204.

But even if the case presents merely a violation of rule 9, I submit that under the rulings of the court in the cases already referred to it should not now entertain this appeal.

The rule is one which the court was competent to make and is necessary to avoid delays in the administration of justice.

The practice of allowing records to be filed at any time during the term, provided the case be not sooner docketed and dismissed, is an apparent violation of the rule, but is sanctioned by the court on the theory that for such purposes the term is but one day.

Insurance Company v. Mordecai, 21 How. 195.

There is no pretense that this case comes within any exception to the rule. I respectfully submit that the former decision is right, and that the case is not properly before the court.

W. O. HARRIS,

For Appellees.

FEBRUARY 27, 1879.

Supreme Court of the United States.

W. H. THOMAS.

vs.

C. W. PURCELL AND OTHERS.

Brief for Purcell and others, Complainants Below.

I contend—

I.

That the court has not jurisdiction of this appeal, because it was not docketed in time.

The appeal was prayed and granted in the court below on the 6th of May, 1875, and docketed in this court on the 19th of November, 1878. It is well settled that an appeal must be docketed during the term of this court next succeeding that at which the appeal is granted.

Edmonson vs. Bloomshire, 7 Wall., 306.

Counsel for Thomas rest the jurisdiction upon the docketing of Griggsby's appeal in the same cause, but the two appeals have no connection, except that under § 1,013, of the Revised Statutes they may be heard upon the same record. If it was necessary to docket this appeal at all, it was necessary to do it in time. Griggsby's appeal only brings up for revision the errors of which he complains. The court cannot, on that appeal, settle the rights of persons not parties to it. The only way Thomas could get

to this court was by prosecuting an appeal. To do this he must unite with some other appellant or prosecute a separate appeal. Having done the latter, there is no statute or rule of court exempting him from laws applicable to other appellants.

II.

That the decree complained of was proper.

The language of the deed of trust is: "To secure the payment * * *" of all the debts of the house of Taylor, Shelby & Co., created since the 14th day of July, 1857."—(Record, 5.)

Thomas claimed, as assignee of a judgment in favor of McClelland, Chenault & Co., and averred in his state of facts "that the debt on which the said judgment was obtained was created since the 14th day of July, 1857."—(Record, 88.) The complainants in their counter state of facts traverse this allegation by denying "that the debt, upon which the judgment of McClelland, Chenault & Co., filed with said statement, was obtained, was created since the 14th day of July, 1857."—(Record, 99.) The master having allowed the claim, the complainants excepted "because there is no evidence that the same was created since the 14th day of July, 1857."—(Record, 122.)

These questions are made to show that the exception to the master's report is broad enough to reach the very point in issue in the case. The question is not whether Griggsby is liable for the Thomas claim, but whether it is provided for in the deed of trust, that is, whether the debt upon which it is founded was created "since the 14th day of July, 1857."

The facts are in a very small compass. McClelland, Chenault & Co., the assignors of Thomas, made a deposit with Taylor, Shelby & Co. in the spring of 1857 (R., 114) of the sum of $4,975.71, which they never withdrew.—(R., 91.) Counsel in their argument say that this deposit was made with the old firm, "and continued with the new one," and

herein lies the fallacy of their whole argument. A deposit with a bank is nothing but a debt due on demand. The money deposited has no earmarks and does not "continue with" the bank or its successors. It stands on the same footing as a demand note.

But it is argued that the debt was assumed by the new firm on or after July 14th, and the only evidence adduced was the advertisement that the new firm would "continue the business of the old house." To "continue the business" of a house is certainly not an assumption of its old debts, due on demand or otherwise. It is only argued by counsel that it amounted to a guaranty, and, if that were true, the debt would not then be "created." The creation of the debt was when the deposit was made, and the language in the deed was intended to exclude just such debts. The deed does not secure "all the debts of Taylor, Shelby & Co. for which said first party may be liable," but "all the debts of Taylor, Shelby & Co. *created since July 14th*, 1857, for which said first party may be liable." It was plainly meant to cut off all the old debts.

Respectfully submitted.

W. O. HARRIS,

For the Appellees, who were Complainants below.

Robert Clarke & Co., Printers, Cincinnati, O. [*Feb., 1879.*

IN THE

SUPREME COURT OF THE UNITED STATES

Susan P. Grigsby, individually and as Administratrix of J. Warren Grigsby, deceased,

Appellant.

vs.

C. W. Purcell, et al.,

Appellees.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF KENTUCKY.

Argument for Appellant upon motion to dismiss for want of Jurisdiction.

By HOADLY, JOHNSON & COLSTON,
and JOHN W. STEVENSON,
Her Counsel.

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APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF KENTUCKY.

Argument for Appellant upon motion to dismiss for want of Jurisdiction.

By HOADLY, JOHNSON & COLSTON,
and JOHN W. STEVENSON,
Her Counsel.

THE CASE.

The decree appealed from was rendered at the February term, 1875, viz, on February 15, 1875. (Record, p. 127.) At the same term, on February 23, 1875, the following entry was made (Record, 128):

"And on another day of our said term of our said Court,

to-wit, on Tuesday, February 23, 1875, came the defendants, J. Warren Grigbsy and Susan P. Grigsby, by F. T. Fox, Jr., their counsel, and pray an appeal from the decree rendered in this cause to the Supreme Court of the United States, which appeal is granted."

The receiver's reports (Record, 128, 130) show payments of costs out of the fund, as recommended by the Master (Record, 51) and approved by the Court (Record, 128), for which reason, as we suppose, no bond was given for costs, except to the clerk of this court.

The transcript was filed, and the cause docketed August 12, 1876. The October term, 1875, had been previously closed, by the adjournment on May 8, 1876, so that this filing and docketing took place in vacation between the October terms, 1875 and 1876. Bond for costs, under the tenth rule, was given to the clerk of this Court.

On December 14, 1878, the following motion and proof of notice were filed with the clerk of this Court:

Supreme Court of the United States.

J. Warren Grigsby and Susan P. Grigsby, Appellants,
No. 136.] *vs.* } Motion.
C. W. Purcell, and others, Appellees.

The appellees move the Court to dismiss this appeal, because the said appeal as prayed and granted in the Court below, and docketed in this Court, is a joint appeal, and the appellants not being united, but opposed, in interest, there is nothing in the decree or orders of the Court below of which they can jointly complain.

W. O. HARRIS,
For Appellees.

LINDEN KENT,
Of counsel.

Supreme Court of the United States.

J. Warren Grigsby and Susan P. Grigsby, Appellants,
vs.
C. W. Purcell, and others, Appellees. } Notice.

To HON. JNO. W. STEVENSON, *Counsel for Appellants.*

SIR: You will take notice that on Monday, December 16, next, I will move the Court to dismiss the appeal in the above styled cause, upon the grounds set out in the printed brief enclosed with this notice.

W. O. HARRIS,
Counsel for Appellees.
LINDEN KENT,
Of Counsel.

November 20 1878.

United States of America, District of Kentucky, ss.

Personally appeared before me, W. O. Harris, to me well known, and made oath, that on the 20th day of November, 1878, he deposited, in the post-office, at Louisville, directed to the Hon. John W. Stevenson, at Covington, Kentucky, the place of his residence, a copy of the within notice, and a copy of the printed brief on the motion referred to in said notice; and that the package containing said papers was duly post-paid.

W. O. HARRIS.

Subscribed and sworn to, before me, at Louisville, Kentucky, by W. O. Harris, this 10th day of December, A. D. 1878.

JAMES A. BEATTIE,
Commissioner of the Circuit Court of the United States for the District of Kentucky.

Printed briefs were filed upon both sides, and upon December 23, 1878, the motion was denied, and the following journal entry thereof made.

Supreme Court of the United States,

No. 136, *October Term,* 1878.

J. Warren Grigsby, et al., Appellants,
vs.
C. W. Purcell & Co., et al.

On consideration of the motion to dismiss this cause, and of the argument of counsel thereupon had, as well in support of as against the same: It is now here ordered by the Court, that said motion be, and the same is hereby, denied.

23d December, 1878.

The attention of the Court was not directed to the delay in filing the transcript and docketing the cause, until January 21, 1879, when, the cause having been called for hearing upon its merits, it was claimed by the same counsel who made the former motion, that the appeal ought, for this reason, to be dismissed, for want of jurisdiction.

ARGUMENT.

Two questions are presented, *first*, whether the delay in filing the transcript and docketing the cause is fatal to the *jurisdiction*, in such a sense that the consent of the appellees, or their waiver of objection, express or implied, can not authorize the hearing upon the merits, and, *secondly*, if this be answered in the negative, whether the objection has been waived.

I.

THE OBJECTION DOES NOT GO TO THE JURISDICTION; AT LEAST NOT SO AS TO PREVENT WAIVER BY CONSENT OR CONDUCT.

Our contention is that the omission of the appellant to file the transcript and docket the cause at the return term, is an irregularity, fatal, if not waived; that it is not the violation of any condition made necessary by *law*, to the jurisdiction of the Court, but is the breach of a rule originating with and always within the control of the Court; that if not complied with, the Court may be said to be without jurisdiction, at most, only in the sense that it has no authority to hear the same, just as every court is without jurisdiction to try a cause before mesne process has been returned, or when it has been returned "not found." And just as in these cases, the defendant waives the objection by an appearance, so here his consent, express or implied, prevents him from objecting, and invests the Court with full power (jurisdiction) to hear and determine the cause on the merits. We do not believe the proposition, that if counsel had not discovered the objection until after the decree had been reversed and the cause remanded, the Circuit Court, in Kentucky, might have disobeyed the mandate and re-entered the decree, or that such decree of this Court would be open to collateral attack, as being utterly null and void, for want of ju-

risdiction. On the contrary, we affirm that if you now so decree, all Courts and persons will be bound to respect your action as that of a court having plenary power in the premises, and if the cases shall be remanded, with such instructions, to the Kentucky Circuit, and after delays of years, such as may happen to the best of cases and the most diligent of counsel, return here again to find the same or new faces and the same or a changed membership of this tribunal, your Honors or your successors will be bound to treat your present action as absolutely binding, notwithstanding the pretended want of jurisdiction. We further maintain that there is no decision of this Court to the contrary, and no language even, of any justice, which may not be reconciled with our proposition; whereas, if your Honors hold the opposite, you must overrule at least three carefully considered opinions of the whole Court, pronounced by Chief Justice Marshall and Justices Story and Johnson, respectively, an explicit statement of Mr. Justice Miller, and the settled practice of fifty years.

That no Court can, *by rule*, impair or limit its *jurisdiction*, we take to be clear. *Shook* v. *Proctor*, 26 Mich. 283.

Chief Justice Chase begins the opinion in *Castro* v. *United States*, 3 Wall. 49, with these words:

"We have no jurisdiction of this appeal unless it has been allowed by some act of Congress, and has been brought in substantial conformity with the legislative directions. The appellate jurisdiction of this Court is, indeed, derived from the constitution; but, by the express terms of the constitutional grant, it is

subjected to such exceptions and such regulations as seemed to the legislative wisdom convenient and appropriate. The Court has always regarded appeals, in other cases, as excepted from the grant of appellate power, and has always felt itself bound to give effect to the regulations by which Congress has prescribed the manner of its exercise. We here use the word appeal in its largest sense, comprehending writs of error and every other form in which appellate jurisdiction may be invoked or brought into action."

To the same effect is this sentence from the opinion of Mr. Justice Miller, in *Edmonson* v. *Bloomshire*, 7 Wall. 310:

"In the case of *United States* v. *Curry*, Chief Justice Taney, answering the objection that the rule was extremely technical, replied that nothing could be treated by this Court as merely technical, and for that reason be disregarded, *which was prescribed by Congress as the mode of exercising the Court's appellate jurisdiction*."

So in the case of *The Lucy*, 8 Wall. 307, Chief Justice Chase says:

"Appellate jurisdiction depends on the constitution and the acts of Congress. When these do not confer it, Courts of the United States can not exercise it. We can not take cognizance of a case not brought before us in conformity with the law."

But Congress has never directly prescribed the time of filing the transcript and docketing the cause. This has been done by rule of Court. Congress has, indeed, limited the time within which this Court may review the judgment or decree of a circuit court, but not in the particular now under consideration. Section 1008, of the Revised Statutes, reads thus:

"No judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in the Supreme Court, unless the writ of error is brought, or the appeal is taken within two years after the entry of such judgment, decree, or order."

In *Edmonson* v. *Bloomshire*, 7 Wall., on p. 311, Mr. Justice Miller says:

"The prayer for the appeal and the orders allowing it constituted a valid appeal. The bond was not essential to it. . . . It is not, therefore, an indispensable part of an appeal that a bond should be filed; and the appeal, in this case, must be held as taken on the 26th day of May, 1860."

What was done in that case, on May 26, 1860? Just that, nothing more, nothing less, which was done in this case on February 23, 1875. An appeal was then "taken," by General and Mrs. Grigsby, within two years (eight days only) after the entry of the decree. And this, we respectfully submit, was full compliance with the only rule prescribed *by Congress* in the premises.

To the same effect is the case of *The Dos Hermanos*, 10 Wheat. 306.

"An appeal under the judiciary acts of 1789, c. 20, § 22, and of 1803, c. 353 (xciii), prayed for and allowed within five years is valid, although the security was not given until after the lapse of five years."

So, too, in *United States* v. *Gomez*, 1 Wall. 690, where it was held that no citation was necessary, because the "appeal was taken" at the "same term when the decree was made."

And in *Brooks* v. *Norris*, 11 How. 204, where the writ of error was dismissed on motion, the judgment having been rendered October 25, 1843, the writ allowed October 19, 1848, but not issued and filed in the Court below until November 4, 1848, Chief Justice Taney says :

"The writ of error is not brought in the legal meaning of the term, until it is *filed in the Court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate Court, and the period prescribed by the act of Congress must be calculated accordingly.*"

We thus ascertain that an "appeal is taken," by its allowance, if in term time, or by its allowance in vacation with service of citation, and a writ of error is brought when it is served by filing in the court which rendered the judgment. But it has been held, and it fortifies the argument, that even if an appeal be taken, or a writ of error brought after the term prescribed by section 1008, the objection may be waived ; also, that although the want of service of citation is a jurisdictional defect, it may be waived, being a case of want of jurisdiction over the party, which the party may always waive. It is not because the Federal Courts can not acquire jurisdiction *over the parties* that consent does not invest them with authority to try a case between citizens of the same State, but because the constitution does not invest these Courts with jurisdiction over *the subject-matter* of a controversy between such parties.

In *Brooks* v. *Norris*, *ut supra*, Chief Justice Taney says (p. 208) :

"According to the English practice, the defendant in error must avail himself of this defence by plea. He can not take advantage of it by motion, nor can the Court judicialy take notice of it, *as the limitation of time is not an objection to the jurisdiction of the Court. It is a defence which the defendant in error may or may not rely upon as he thinks proper.* But according to the established practice of this Court, he need not plead it, but may take advantage of it by motion. The forms of proceeding in the English Courts of error have never been adopted or followed in this Court. And either party, without any formal assignment of error or plea, may avail himself of any objection which appears upon the record itself. In this case, the bar arising from the lapse of time is apparent on the record, and the defendant may take advantage of it by motion to quash or to dismiss the writ."

It has been held in many cases that no citation need be issued when appeal is allowed in open Court in term time.

Phillips Practice (4th ed.), 116 and cases cited.

If the appeal be allowed *out* of Court, the want of service of a citation is fatal to the jurisdiction of this Court. But it may be waived. If waived, the Court may proceed to review the decree below.

In *Garrison* v. *Cass Co.*, 5 Wall, 823, there was no citation.

Chief Justice Chase says:

"At most, it can only be regarded as an allowance of an appeal at the June term, 1865, and no citation appears to have been issued since to the appellees, nor was there any equivalent notice, nor has there been any waiver. *The appeal must therefore be dismissed for want of jurisdiction.*

In *Alviso* v. *United States*, 5 Wall. 824, the transcript was filed in time. Chief Justice Chase, however, says:

"But no citation was issued to the adverse party, and there is nothing to show any waiver; and a citation with due return, or waiver by general appearance or otherwise, *is indispensable to jurisdiction on appeal.*"

That the citation, though thus shown to be "indispensable to jurisdiction on appeal," may be waived by agreement, and is waived by a general appearance in the appellate Court, without moving to dismiss the appeal at the first term, see Phillips' Practice (4th ed.), 116 *et seq*, and cases cited.

That the bond for costs may be given after the cause has been docketed in this Court, although required by section 1000, Rev. Stat. to be taken by the "justice or judge signing a citation on any writ of error," is established by *Edmonson* v. *Bloomshire*, *ut supra*, and by—

Bangs v. *Blue Ridge R. R. Co.*, 23 How. 1.
Brobst v. *Brobst*, 2 Wall. 96.
Seymour v. *Freer*, 5 Wall. 822.
See also Phillips' Practice, 122, *et seq.*

In view of this condition of the statutes and decisions, will it not be strange, not to say anomalous, if it be discovered to be the law that while appeal or writ of error within two years, citation and bond, each of

which are required by the statutes, may be waived by the party, and the assignment of errors, which section 997, Rev. Stat., peremptorily commands to "be annexed to and returned with any writ of error," is permitted by the Court to be contained in the brief filed "at least six days before the case is called for argument," the filing of the transcript by the appellant, for the time of which no provision whatever is directly made by law, is so fatal to jurisdiction that neither the Court nor the parties can avert its ruinous consequences, and that if the defect be jurisdictional, a long list of exceptions should exist, created, not by statute, but by judicial fiat, to save cases from this fate?

The Palmyra, 12 Wheat. 10.
United States v. *Booth*, 21 How. 512.
Alviso v. *United States*, 6 Wall. 457.
United States v. *Vigil*, 10 Wall. 423.

In *United States* v. *Gomez*, 3 Wall. 763, Mr. Justice Clifford says of this subject:

> "Certains exceptions to that general rule are recognized and allowed, which are as well established as the rule itself. They are admitted as indispensable limitations to guard against fraud and circumvention, and to prevent a failure of justice. Where the appellant, having seasonably procured the allowance of the appeal, is prevented from obtaining the transcript by the fraud of the other party, or by the order of the Court, or by the contumacy of the Clerk, the rule does not apply, provided it appears that the appellant was guilty of no laches, or want of diligence, in his efforts to prosecute the appeal."

Most singular, to speak moderately, it will be if this Court finds itself possessed of these effectively benefi-

cent powers to relieve and dispense with positive acts of Congress, but imbecile in the presence of the ninth rule. Like Frankenstein in Mrs. Shelley's story, it will be helpless before a monster of its own creation.

Doubtless the ninth rule has been violated, but however grave this offence, it is not incapable of excuse or condonation.

That rules of Court are always within the control of their makers, and will never be allowed to work unjust results, seems to us self-evident. Nevertheless, it is proved by the following authorities:

Martine v. *Lowenstein*, 68 N. Y. 456.
Stone v. *Morgan*, 10 Paige, 615.
Deming v. *Foster*, 42 N. H. 178.
Meek v. *Richardson*, 4 Rich. Eq. 88.
Tindal v. *Tindal*, 1 S. C. 113.
Ochus v. *Sheldon*, 12 Fla. 138.
De Leon v. *Owen*, 3 Tex. 153.

No Court can, by rule, deprive a party of a statutory right.

Deming v. *Foster*, *ut supra*.
Shook v. *Proctor*, 26 Mich. 283.
Wyandotte Rolling-Mills Co. v. *Robinson*, 34 Mich. 428.
Kennedy v. *Cunningham*, 2 Metc. (Ky.), 538.
De Lorme, *Adm'r*, v. *Pease*, 19 Ga. 220.
People v. *McClellan*, 81 Cal. 101.

It follows that, in the strict sense of the word, a *jurisdictional* defect can never be the result of the breach of a rule. Certainly jurisdiction over the subject-mat-

ter exists or is wanting according to the *law* and the fact of conformity or non-conformity to *legal* requirements, irrespective of rules of Court. If the statute be complied with, although a rule may be violated, it can not be a case of want of jurisdiction of the subject-matter.

Before 1803, the only method of removing causes to this Court from the Circuit Courts was by writ of error.

The act of March 3, 1803 (2 Stat. at Large, 242), provides:

"That from all final judgments or decrees rendered, or to be rendered, in any Circuit Court, or in any District Court acting as a Circuit Court, in any cases of equity, ... an appeal . . . . shall be allowed to the Supreme Court of the United States, and that upon such appeal a transcript of the libel, bill, answer, depositions, and all other proceedings, of what kind soever in the cause, shall be transmitted to the Supreme Court; . . . . and that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error; and that the said Supreme Court shall be, and hereby is, authorized and required to receive, hear, and determine such appeals."

Substantially the same provisions are now in force. See sections 692, 698, and 1012 of the Revised Statutes.

These provisions have been complied with in this case. Within the time limited by section 1008, Rev. Stat.—the only time mentioned in the statutes—the ap-

peal was "taken," and the transcript transmitted. The act does not say when or by whom it shall be transmitted. It merely limits the time of taking the appeal, and leaves the procedure in other respects to be regulated by rule.

Turning now to writs of error, we find them provided for by the act of September 24, 1789 (1 Stat. at Large, 84), section 22 of which provides as follows:

"That final decrees and judgments in civil actions in a District Court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a Circuit Court, holden in the same district, upon a writ of error, *whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record*, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such District Court, or a justice of the Supreme Court, the adverse party having at least twenty days' notice; *and upon a like process* may final judgments and decrees in civil actions and suits in equity, in a Circuit Court, brought there by original process, or removed there from Courts of the several States, or removed there by appeal from a District Court, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court, the citation being in such case signed by a judge of such Circuit Court, or justice of the Supreme Court, and the adverse party having at least thirty days' notice."

The same provisions are now contained in sections 691, 997, 999, of the Revised Statutes.

Section 9 of the act of May 8, 1792 (1 Stat. at Large, 278), provides:

"That it shall be the duty of the clerk of the Supreme Court of the United States forthwith to transmit to the clerks of the several Circuit Courts the form of a writ of error, to be approved by any two of the judges of the Supreme Court, and it shall be lawful for clerks of the said Circuit Courts to issue writs of error agreeably to such forms, as nearly as the case may admit, under the seal of the said Circuit Courts, returnable to the Supreme Court, in the same manner as the clerk of the Supreme Court may issue such writs, in pursuance of the act entitled 'an act to establish the judicial Courts of the United States.'"

To this corresponds section 1004 of the Revised Statutes:

"Writs of error returnable to the Supreme Court may be issued as well by the clerks of the Circuit Court, under the seals thereof, as by the clerk of the Supreme Court. When so issued they shall be, as nearly as each case may admit, agreeable to the form of a writ of error, transmitted to the clerks of the several Circuit Courts to the clerk of the Supreme Court, in pursuance of section 9 of the act of May 8, 1792, chapter 36."

The following is the form thus adopted:

The United States of America, ss.

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of Ohio, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between —— and ——, a manifest error hath happened to the great damage of the said ——, as by —— complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly,

you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the —— day of ——, 18—, in the year of our Lord one thousand eight hundred and ——.

—— ——,

Clerk of the Circuit Court of the U. S., S. D. O.

See also Phillips' Practice (14 ed.), 467.

In *Insurance Company of the Valley of Virginia* v. *Mordecai*, 21 How. 195, a writ of error had been made returnable to the second Monday in January, the first Monday in December being the first day of the term as then ordered by law. Upon motion, the case was dismissed for want of jurisdiction, the writ being held void and incapable of amendment.

The reasoning of Chief Justice Taney in this case will, we presume, be relied on by our learned adversary to show that the act of Congress, properly construed, requires the transcript to be docketed at least before the end of the return term, to give the Court jurisdiction, and we therefore ask your Honors' careful attention to it, for nowhere else in the reported opinions of the judges of this Court, as we read them, can there be found any plausible ground for the contention that the

duty to file a transcript at the term next after appeal is enforced by any authority higher than a rule of Court.

It is *first*, however, to be observed of this, as of all the other cases which will be cited against us, that it was decided on motion to dismiss, and that no waiver was pretended in the case; *secondly*, that the case was properly dismissed for want of jurisdiction, whether this be treated as want of jurisdiction of the subject-matter or of the parties, or the word be used in the sense of want of power or authority to hear and determine because of non-conformity to a rule of Court, no sufficient excuse having been given.

The argument by which it will be sought to apply this case to the present controversy is this: Appeals are subject to the rules, regulations, and restrictions prescribed for writs of error; writs of error are required by law to be in the form of the writ transmitted to the clerks of the Circuit Courts by the clerk of the Supreme Court, under the act of 1792. This form commands the judges of the Circuit Court to send the "record and proceedings," with the writ, to this Court on the first day of the next term. This command has been disobeyed in the present case. Therefore this Court is without jurisdiction.

Sed non sequitur. Only the form of the writ is prescribed by this act of Congress, not obedience to the writ. The consequences of disobedience are not provided for by the statute in question, but are left to be controlled by the rules of Court, or by the general principles of the unwritten law, or by other acts of Congress. The act of

Congress says the writ shall, as nearly as each case may admit, be "agreeable to the form of a writ of error transmitted," etc. In *Insurance Co.* v. *Mordecai*, there was a material deviation from this form; for which reason it was rightly held that the Court had no jurisdiction of the appeal. But the supposed case we are considering is that of a writ in exact accordance with such form, disobeyed, however, by not being returned until after the term. How can it be said in such case that this statute has been violated? On the contrary, the act of Congress has been obeyed to the very letter. If this Court shall ever dismiss such case, it will not be because section 1004, Revised Statutes, has been broken. How can that section be more fully obeyed than by the issue of a writ of error in the exact form it requires?

In the next place, this Court unanimously decided, in *Wood* v. *Lide*, 4 Cranch, 179, that a return after the return term is not too late—at least that it is an irregularity which may be waived. That case was cited by Mr. Robinson in argument (21 How. 199); and there is not a word in Chief Justice Taney's opinion which indicates dissent from it, or evinces any purpose to overrule its authority. He was very familiar with it. He had cited and relied on it in *Villabolos* v. *United States*, 6 How. 90.

In the next place, the writ is addressed to the judges of the Circuit Court. It commands that

"*you* send the record and proceedings aforesaid to the Supreme Court of the United States, together with this writ, so that *you* may have the same at the city of Washington on the second

Monday of October next, in the said Supreme Court to be then and there held."

The duty is imposed, not on the plaintiff in error, but on the Court below. The disobedience is theirs, not his. And it is certainly going too far to say that this Court can be ousted of *jurisdiction* by the disobedience of its mandate by a Circuit Court. In the passage already cited from *United States* v. *Gomez*, 3 Wall. 763, Mr. Justice Clifford admits that where a transcript is filed too late, because of the order of the Court below or the contumacy of its clerk, the rule does not apply. As the writ is in every case directed to the Court below, and disobeyed, if at all, by it, is it not going too far to say that such disobedience raises a presumption that the Court below was not in fault, which the plaintiff in error must overthrow by proof? At least, is it not going too far to say that such apparent disobedience by the Court below, unexplained by proof that it was real disobedience, ousts the Court of jurisdiction, and that jurisdiction is restored by proof of actual disobedience?

But, it will be said, "you forget section 997 Rev. Stat., which requires an authenticated transcript to be annexed to and returned with any writ of error, at the day and place therein mentioned." But the settled practice of this Court is, that this is directory only. *First*, "an assignment of errors, and a prayer for reversal, with a citation to the adverse party," are in the same breath of the sentence just as much required to be annexed to and returned with any writ of error, as the authenticated transcript. What authority has the Court

to dispense with these requirements? And when were they ever obeyed in any case? The rules of this Court postpone the assignment of errors until the sixth day before the hearing, the citation is waived by appearance, and the prayer for reversal is obsolete or remitted to its appropriate place in forensic peroration.

"It has been repeatedly held that Courts have no dispensing power, even in matters of practice, where the legislature have spoken."

Seymour v. *Judd*, 2 Comst. 466.

The rational explanation is that the statute is directory. How else can the ninth rule be justified, viz, that the record may be filed after the return day of the writ? The record is *never* required to be annexed to and returned with the writ of error "at the day and place therein mentioned." The eighth rule provides that if final judgment is rendered more than thirty days before the first day of the next term, the writ of error, if taken sooner, must be returnable on the *first* day of the term, and the ninth rule allows until the *sixth* day of the term for filing records in such cases; the eighth rule makes the writ of error returnable on the third Monday (*fifteenth* day) of the term, in all cases in which the judgment was rendered less than thirty days before the first day of the term; and the ninth rule gives until the *thirtieth* day of the term to file the record in such cases, and the practice is to allow such filing at any time during the term.

It is absolutely conclusive against the proposition

we are combating, that while section 997 Rev. Stat., which requires the writ to be returned, with an annexed authenticated transcript, "at the *day* and place therein mentioned," and section 1004, which fixes the day, by adoption of the form of writ of error prescribed under the act of 1792, imposes this duty on the judges of the lower courts, who can not, of course, exclude the jurisdiction of this Court by neglect or refusal to obey the mandate, the ninth rule makes it "the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause, and file the record thereof," on a different day. Nowhere, in any act of Congress, will the industry of our learned adversary find this duty imposed upon a party to the cause. The party's diligence is called into exercise only by the ninth rule of Court. But for the rule, he might leave the duty where the form of the writ places it, viz, to be performed by the Court below.

Nor does Chief Justice Taney's opinion conflict with this view. The matter was not before his mind. He was considering a patent deviation from the prescribed form of writ, and speaking of the rules, and not of any statutory requirement, adds (page 201—the italics are our own):

"The rules of the Court have been framed in conformity with this return day of the writ; and the rule which permits a defendant in error to docket and dismiss a case, if the transcript is not filed *by the plaintiff within the time therein limited*, necessarily presupposes that the writ is returnable on the first day, and that the plaintiff *might* then file the transcript." (Observe, he does not say "must.") "He may, it is true, return the writ,

with the transcript, *at any time during the term*, unless the case has been docketed and dismissed, when it can not afterwards be filed without the special order of the Court. But this permission to return the writ and file the transcript at a subsequent day, is upon the principle that, for certain purposes of convenience or justice, the term is considered as but one period of time—as one day, and that day the first of the term."

But statutes must be obeyed, not dealt with on principles of convenience or justice; those were for the consideration of Congress, which enacted them. Obviously, the Chief Justice is discussing rules of Court, not acts of Congress. How different his language from that of Chancellor Walworth, in a somewhat similar case, when considering the effect of a statute.

"The petition of appeal was filed one day too late; but the delay is fully excused by the irregularity of the mail. And the neglect to procure the transcript within the twenty days is also satisfactorily accounted for. But as the time within which the appeal was to be brought depended upon a statutory regulation, and not upon the rules or practice of the Court, if the appeal was not entered with the surrogate within the time allowed by law for appealing, the objection is fatal, if it has not been waived by the respondent, and the appeal must be dismissed."

Stone v. *Morgan*, 10 Paige, 615.
See also *People* v. *Eldridge*, 7 How. Pr. 108.

Unless your honors are prepared to do what Chief Justice Taney and his associates did not do in *Insur-*

ance Co. v. *Mordecai*, viz, overrule *Wood* v. *Lide*, our contention here must prevail. To a perfect understanding of that case, reference is however necessary to the prior case of *Blair* v. *Miller*, 4 Dallas, 21, decided in the year 1800, of which the following is the entire report:

"Writ of error from the Circuit Court of Virginia. The judgment was rendered in the Circuit Court on the 28th of May, 1799, but the record was not transmitted, nor the writ returned into the office of the Supreme Court, till the 4th of February, 1800. *Swift* objected to the acceptance and return of the record and writ, and

By the Court: The writ has become a nullity because it was not returned at the proper term. It can not, of course, be a legal instrument to bring the record of the Circuit Court before us for revision."

With this precedent in view, this Court, in 1807, came to the consideration of the case of *Wood* v. *Lide*. It was a writ of error to the Circuit Court for Georgia. *The facts were exactly like those of the case under consideration, except that this is an appeal in equity*. The writ of error was dated and filed in the clerk's office of the Circuit Court, December 23, 1805, and was made returnable to the February term, 1806, but was not returned and filed in the clerk's office of the Supreme Court until the 18th of March, 1806, after the Court had closed its session. Counsel for plaintiff suggested that the writ of error ought to be dismissed, of course. But the Court inclined to the contrary, and called on him for argument. He contended that

"the writ could not be returned at any other term than that to which the defendant in error had been cited to appear. After the expiration of the term it was void. The execution of a writ of error is the sending up the record according to its command, and to send the record up at another term is no execution of the writ. He relied upon the case of *Blair* v. *Miller*, in this Court (4 Dall. 21), as being decisive."

Chief-Justice Marshall states that

"there had been some difference of opinion among the Judges, which arose from their not understanding perfectly the facts of the case. If the writ of error had been served when it was not in force (that is, after the return day), such service would have been void. But if served while in force, the return afterwards will be good.

The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the Court where the judgment was rendered. Laws U. S. Vol. 1, p. 63, § 23.

If it be so served before the return day, the service is good.

In the case cited from 4 Dall. it does not appear which party made the motion, nor whether there was an appearance for the opposite party.

In the present case, the writ of error having been served when in full force, and the writ of error returned, although not at the first term, the appearance of the defendant in error has waived all objection to the irregularity of the return."

That the Court which decided *Wood* v. *Lide* carefully considered this subject in all its bearings, is shown not merely by the character of the judges, but also by the fact that at the February term, 1806, they had adopted their 19th rule, in which we find the first trace of the practice now prescribed by the ninth rule. (1 Wheaton, xvi.) It is as follows:

"All causes, the records of which shall be delivered to the clerk on or before the sixth day of the term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of the term, either party will be entitled to a continuance.

In all cases where a writ of error shall be supersedeas to a judgment rendered in any Court of the United States (except that for the District of Columbia), at least thirty days previous to the commencement of any term of this Court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the clerk of the Court, within the first six days of the term, and if he shall fail to do so, the defendant in error shall be permitted afterwards to lodge a copy with the clerk, and the cause shall stand for trial in like manner as if the record had come up within the first six days, or he may, by producing a certificate from the clerk, stating the cause, and that a writ of error has been sued out which operates as a supersedeas to the judgment, have the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the Court for the District of Columbia at any time prior to the session of this Court."

At the February term, 1821, rule No. 32 (6 Wheaton, vi, numbered 29 in 1 Peters, ix), was adopted, which is in substance that part of the present ninth rule, which, in case of judgments or decrees rendered thirty days and more before the return term, requires the record to be filed by the plaintiff in error or appellant during the first six days of the term, or, in default thereof, permits the record to be docketed and the cause dismissed at the instance of the defendant in error or appellee.

This was the condition of the law and the rules of Court when *Pickett's Lessee* v. *Legerwood*, 7 Peters, 144, was decided.

Mr. Justice Johnson says :

"This was a motion to quash the writ of error upon two grounds. The first was because the record was not filed with the clerk of this Court until the month of June, 1832, whereas the writ of error was duly served, returnable to the January term, 1832. It was contended that the case was out of Court by lapse of time, and the filing at that late day could not reinstate it. But on this ground, we are of opinion that the motion can not be sustained; since the defendant in error might have availed himself of the rule of Court, which gave him the right to docket and dismiss the cause. This Court decided in the case of *Wood and Lide*, that provided the service be before the return day of the writ, a return at a subsequent day will be sustained."

Then followed the 43d rule, adopted at the January term, 1835 (9 Peters, vii), which is in substance the present ninth rule, except that it contains no provision for writs of error and appeals from judgments and decrees rendered less than thirty days before the term.

In this state of the law and rules, *Owings* v. *Lessee of Tiernan*, 10 Peters, 24, was decided.

It was a motion by Mr. Underwood to docket and dismiss a writ of error to the Circuit Court for the Kentucky Circuit, under this 43d rule, the writ having been sued out before the January term, 1835, and not yet docketed, and a counter-motion by Mr. Crittenden to docket then, the record having been returned to the clerk's office in October, 1835, and the docketing delayed, the bond for supreme court clerk's costs not having been given.

Mr. Justice Story delivered the opinion of the Court to the following effect :

"The rule of the Court for docketing or dismissing causes, has never been applied to any cases, where, before the motion was made, the cause had been actually placed on the docket. In the present case, the motion to dismiss and the motion to docket the cause are contemporaneous. The Court are of opinion, that under such circumstances, the motion to docket the cause ought to be allowed, upon the usual bond for the clerk's fees being given. For this purpose time will be given to the plaintiff in error (as it is asked), until the first day of March next. If by that time no bond is given, the cause will then be dismissed according to the motion of the defendant in error."

In *Gwin* v. *Breedlove*, 15 Peters, 284, the Court reinstated an appeal which had been docketed and dismissed under the forty-third (present ninth) rule, at the same term.

Chief Justice Taney says:

"In the case of *Owings* v. *Tiernan's Lessee*, 10 Peters, 24, the motion to dismiss and the motion by the plaintiff in error, to docket the case, were contemporaneous, and the Court said that the motion of the plaintiff ought to be allowed, although, in that case, it appeared that the writ of error had been sued out to the preceding term of this Court."

Here is not a word of disapproval of *Owings* v. *Tiernan's Lessee*, but it is cited, apparently approved, and followed.

Owings v. *Tiernan's Lessee*, was again followed in *Van Rensselaer* v. *Watts' Executor*, 7 Howard, 785. Both parties moved to docket a case *nunc pro tunc*, the transcript having been received by the clerk in season, but not filed because no bond had been given

to the clerk of this Court, as required by the thirty-seventh (present tenth) rule.

In overruling the motion Chief Justice Taney said:

"This Court considers the practice established by the decision in *Owings v. Tiernan*, 10 Peters, and do not wish to disturb it."

In other words, the appeal could not be docketed *nunc pro tunc*, but might be docketed *nunc*, or, as was done in *Owings* v. *Tiernan*, at a future day. And this was at the date of 7 Howard (1849), the "established practice," which the Court did "not wish to disturb."

Yet this was after the cases of *Villabolos* v. *United States*, 6 How. 81, and *United States* v. *Curry*, Ib. 106, had been decided, and this is the language of the same Chief Justice who pronounced the opinion of the Court in both those cases, and in the former cited *Wood* v. *Lide*, and *Pickett's Heirs* v. *Legerwood*, in support of his views. It will be exceedingly strange if the two cases in 6 Howard are not found to be consistent with the cases they cite and follow.

In *Villabolos* v. *United States*, the appeal was dismissed upon the motion of Attorney-General John Y. Mason, made at a former term, to dismiss, "upon the ground of its being *irregularly* brought up," and was argued at January term, 1848, by Attorney-General Clifford for, and Mr. Yulee against the motion. One of the grounds upon which it was granted was that appeals from the Supreme Court of the Territory of Florida, being required by the act of 1828 (4 Stat. at Large, 284),

to be prosecuted in four months, and in other respects placed on the footing of appeals and writs of error, under the acts of 1789 and 1803, this appeal not having been made in open court, "consequently," as stated in the syllabus,

"Where there was only an entry of an appeal in the clerk's office, and no citation served within four months, the appeal was not regularly brought up, and must be dismissed on motion."

Chief Justice Taney says (p. 90):

"But if the citation had been properly signed, it is too late. By the act of 1828, the claimant must appeal within four months; and the act of 1803 subjects appeals to the rules and regulations prescribed by law in cases of writs of error. Now, the writ of error is always returnable to the term of the appellate court next following the date of the writ; and the citation required by the act of 1789 (which is a summons to the opposite party to appear), must be returnable to the same term, and, unless the writ and citation are both served before the term, the case is not removed to the appellate court, and the writ, if returned afterwards, will be quashed. *Lloyd* v. *Alexander*, 1 Cranch. 365; *Bailiff* v. *Tipping*, 2 Cranch. 406; *Wood* v. *Lide*, 4 Cranch. 180; *Pickett's Heirs* v. *Legerwood*, 7 Peters, 144, and *Yeaton* v. *Lennox and others*, 8 Peters, 123. It follows that where a citation is required in a case of appeal, it must, as in the writ of error, be issued and served on the opposite party before the term of the appellate court next after the appeal is entered. *Yeaton* v. *Lennox*, 7 Peters, 220. The entry of the appeal in the clerk's office is analogous to the issuing a writ of error, it is returnable to the next term of the appellate court; and a citation to the opposite party to appear is necessary. Here the entry of appeal was made in the clerk's office within four months from the date of the decree, and, therefore, within the time limited by law. The citation might, upon such an entry, have been issued after the expiration

of the four months. But it must be issued and served before the term of this Court next succeeding the entry of the appeal. And unless this is done the case is not brought before this Court. There was no such citation in the present case, and the entry in the clerk's office, standing by itself, was not a removal of the case by appeal, according to the act of Congress. There was, therefore, no appeal within the time limited by law.

It is obvious that there is here nothing in conflict with our contention. The question was of the time of service, not of return, and the decision is in full accord with *Wood* v. *Lide*, which it recites and relies on.

United States v. *Curry* was an appeal from the District Court of the United States for the District of Louisiana. Mr. Curry moved to dismiss the appeal, as having been irregularly brought up, the decree having been rendered and signed June 26, 1846, the appeal allowed by the district judge, upon petition, November 5, 1846, but no citation issued until August 14, 1847, after the expiration of the year within which the appeal might be made.

Chief Justice Taney says (p. 112):

"The acts of Congress concerning appeals in cases of this description were fully considered by the Court in the case of *Villabolos* v. *United States*, decided in the early part of the present term, and the previous decisions of this Court referred to and examined; and the Court in that case held that the appellant must prosecute his appeal to the next succeeding term of this Court, and the adverse party be cited to appear at that time, whenever the appeal is taken by entering it in the clerk's office. In the case before us, the appeal was filed in the clerk's office November 5, 1846. The next succeeding term of this Court commenced on the 7th day of December in the same year. But

there was no citation to the adverse party to appear at that time, and, consequently, the case was not removed to this Court upon that appeal. The citation which issued on the 27th of August, 1847, would not bring up an appeal returnable to December term, 1846."

Still no question of return or of waiver is made, and it is also to be noted that in *Villabolos* v. *United States* the objection made by Attorney-General Mason, and argued by Mr. Justice Clifford, when Attorney-General, was put upon the ground of irregularity, not want of jurisdiction, as was also the case in *United States* v. *Curry*.

The first trace of the treatment of this class of irregularities as jurisdictional is to be found in *Steamer Virginia* v. *West*, 19 How. 182, in which

"Mr. Johnson moved to dismiss the appeal upon the ground that the record was not filed in time."

The following is the opinion of the Court, pronounced by Chief Justice Taney:

"This is an appeal from the Circuit Court. The decree from which the appeal has been taken was passed by the Circuit Court on the 17th day of November, 1855, and the appeal was prayed on the same day in open Court, but it was not prosecuted to the next succeeding term of the Court, and no transcript of the record was filed here during that term; but a transcript has been filed at the present term of this Court, and the case docketed, and a motion is made to dismiss it, upon the ground that the appeal is not legally before this Court, according to the act of Congress regulating appeals.

The construction of this act of Congress, and the practice of this Court under it, has been settled by the cases of *Villabolos* v.

United States (6 How. 81), and *The United States* v. *Curry* (6 How. 106). The transcript must be filed in this Court and the case docketed at the term next succeeding the appeal, *in order to give this Court jurisdiction.* This case must, therefore, be dismissed.

But the dismissal does not bar the appellant from taking and prosecuting another appeal at any time within five years from the date of this decree, provided the transcript is filed here, and the case docketed at the term next succeeding the date of such second appeal."

Here, again, we find nothing in conflict with *Wood* v. *Lide*. It is not said whether jurisdiction over the subject-matter or over the parties is referred to. No waiver was claimed. It was a bald case of violation of the rules, unexplained and unexcused.

Another remark is prompted by the concluding sentence of the opinion. At that time the period of five years was given in which to appeal, and coverture was a disability which postponed the term still further. Now married women and men are alike required to appeal within two years. The reasons for severity in the administration of the rule which then existed no longer operate.

"Statutes giving the right of appeal are always liberally construed in furtherance of justice, and such an interpretation as will work a forfeiture of such right is not to be favored."

Pearson v. *Lovejoy*, 50 Barb. 407.

See also—

Gilmore v. *Brenham*, 1 La. An. 414.

Isabella v. *Pecot*, 2 Ib. 387.

Ludeling v. *Frellsen*, 4 Ib. 534.

We desire, also, to ask your Honors to compare carefully the cases of *Villabolos* v. *United States* and *United States* v. *Curry*, with the statement that the "transcript must be filed in this Court and docketed at the term next succeeding the appeal, in order to give this Court jurisdiction." That proposition was not involved or decided in either of those cases. The utmost extent to which they can be pressed is found in their own language, that the writ is "*returnable* to the term of the appellate court next following," but what are the consequences of non-return, at that time, is not settled by those decisions.

Are we too presumptuous in this criticism of the language of Chief Justice Taney? Certainly that great jurist would not have objected, if his attention had been directed to the fact that he had stated a conclusion which, however correct, was not warranted by the premises. "*Noblesse oblige*" is a maxim governing Courts of last resort, as well as the aristocracy of birth. And it is never disrespectful to say that Jove sometimes nods. It is only when inferior personages of the celestial hierarchy are visibly asleep, that it becomes impolite for mortals to stare or call attention.

Next followed the case of *Insurance Co.* v. *Mordecai*, already sufficiently considered, and *Overton* v. *Cheek*, 22 How. 46, in which a writ of error was dismissed upon motion. The writ had no seal, and was returned to this Court with the transcript. Two terms later a paper was filed in the clerk's office, in form of a writ of

error, but without a seal, and having no authenticated transcript annexed.

Mr. Justice McLean closes his opinion with these words:

"The cause must therefore be dismissed for these *irregularities*, without noticing others appparent on the record."

In *Mesa* v. *United States*, 2 Black, 721, an appeal from California had been docketed at the second term, and there was a motion to dismiss.

"*Per Curiam.*—Let this appeal be dismissed. It has not been prosecuted in the manner directed, nor within the time limited by the act of Congress, which requires that the transcript shall be filed at the next succeeding term after the appeal is taken."

Here again there was no question of waiver, but the objection was insisted on by motion.

We have thus reached the end of the causes decided during the life of Chief Justice Taney, with whom it has been suggested that the doctrine advocated by our learned adversary originated, and we find nothing to conflict with Chief Justice Marshall's opinion in *Wood* v. *Lide*. The fact that the ninth rule existed, and received its final shape (substantially) in 1853 (Rule 63, 16 How. ix), and appears in its present form in the revision made in 1858 (21 How. v), indicates that, notwithstanding the use of the word "jurisdiction," in *Steamer Virginia* v. *West*, softened in *Overton* v. *Cheek* to "irregularity." and not withstanding *Mesa* v. *United States*, the Court considered it within their province and power, by rule, to permit transcripts to be filed after the "day" fixed by act

of Congress, as prescribed in the form of writ of error transmitted under the act of 1792, the only way in which Congress has ever appointed any time. Congress has certainly required the filing of the transcript, in case of writ of error, in no other section than No. 997, Rev. Stat., and this provides that four documents shall be "*annexed to* and returned with" the writ, "at the *day* and place *therein* mentioned"—viz: 1. An authenticated transcript; 2. An assignment of errors; 3. A prayer for reversal; and, 4. A citation to the adverse party. Now, if the word "day," as used by Congress, means the first Monday of October, or the third Monday of October, which are the only days "*therein* mentioned," it is difficult to see whence the Court derives its authority for permitting the writ and transcript to be filed later in the term. If Congress meant, by the word "day," to include the whole term, which is not the day "*therein* mentioned," then it is difficult to see whence the Court derived its power to adopt the rule allowing an appellee or defendant in error to docket and dismiss before the end of the term. If, as was said in the *Mesa* case, the act of Congress

"requires that the transcript shall be filed at the next succeeding *term* after the appeal is taken,"

why should parties be turned out of Court on the seventh or thirty-first day of the term? The last sentence of the ninth rule is:

"And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same

shall have been docketed and dismissed under this rule, unless by order of the Court.

We respectfully submit that if Congress has given parties the whole term in which to file records, this limitation is unauthorized by law, sanctioned, though it may be by more than seventy-five years' practice;—and that if Congress has only given until the "day therein mentioned," the first or third Monday of the term (as the case may be), then the extension of time for filing, by the same rule, to the sixth or thirtieth day (as the case may be) is equally unauthorized by law. We can only reconcile these contradictions and the various decisions of the Court by treating the act as directory, and the entire ninth rule as obligatory, but liable to be strictly or liberally enforced according to the condition of the business of the Court.

In this connection the statement of Mr. Justice Miller, already referred to, becomes important. It is found in the case of *Mussina* v. *Cavazos*, 6 Wall. 355. The point of the case is that

"the writ of error is served by depositing it with the clerk of the Circuit Court, and if he makes return by sending a transcript here in due time, this Court has jurisdiction to decide the case, although the original may be lost or destroyed before it reaches the Supreme Court."

It thus appears that, although the statute requires the transcript "to be annexed to and returned with" the writ of error, the absence of the writ itself does not create a jurisdictional defect. Like the bond, citation,

assignment of errors, and prayer for reversal, it may be dispensed with.

On page 358, Mr. Justice Miller says:

"In the case of *Castro* v. *United States*, we held, on consideration of the previous cases, and on principle, that unless the transcript from the Court below was returned before the end of the term next succeeding the allowance of the appeal, this Court had no jurisdiction. Although the question there arose upon an appeal, the principle decided is equally applicable to a writ of error; for the act of 1803, which first authorized appeals, subjects them to the rules and regulations which govern writs of error. The ground of that decision, and also of the case of *Villabolos* v. *United States*, which preceded it, *is the general principle that all writs which have not been served, and under which nothing has been done, expire on the day to which they are made returnable. They no longer confer any authority. An attempt to act under them is a nullity, and new writs are necessary if the party wishes to proceed.*"

We have taken the liberty to italicise the later lines of this extract. Certainly this is entirely in accord with Chief Justice Marshall's opinion in *Wood* v. *Lide*. Nor is a word said, in this statement of the "ground of that decision," as to the time of *return:* the necessity of *service* before return day only is insisted on.

Mr. Justice Miller proceeds to consider the objection, made on motion to dismiss, that the writ is required by the act to be "returned therewith," and argues (p. 359), that

"If this be a sound construction, then it is equally necessary that there shall be returned, at the same time, an assignment of errors, a prayer for the reversal of the judgment, and a citation to the

adverse party. But an examination of all the records of cases decided in this Court will show that, in four cases out of five, there has been neither an assignment of errors nor any prayer for reversal. We have also held, frequently, that if the appeal is taken in the open Court, during the term at which it was rendered, in the presence of the appellee, no citation is necessary, and that a general appearance in this Court for defendant in error, or in appeal, waives the necessity of a citation.

The act referred to also says that all these things must be returned together at the 'time and place mentioned in the writ;' that is to say, on the first day of the term next after the issuing of the writ. Yet we have repeatedly held that, if returned on any day during that term, we will hear and decide the cause. *It can not, therefore, be maintained that a rigid and literal fulfillment of everything prescribed in that section is an absolute and indispensable requisite to the appellate jurisdiction of this Court.*"

If we have seemed bold in claiming this statute to be directory, here is our justification. This Court has said not only that the assignment of errors, prayer for reversal, and citation, which in the same sentence of the act are just as much required to be "annexed" and returned "at the day and place therein mentioned," as the writ of error and transcript, but that even the writ itself, need not be so returned, because "a rigid and literal fulfillment of *everything* prescribed in that section" is not an absolute and indispensable requisite to the appellate jurisdiction of this Court. If *everything* is not indispensable, is *anything?* Why not *everything*, if the act be treated as mandatory, imperative? Why *anything*, if it is directory? Whence comes the power of selection, to separate the indispensable from the dispensable,

and to set apart the transcript as the only necessary item? Why the transcript rather than the writ? Is this a case of the "survival of the fittest?"

On page 361, Mr. Justice Miller says:

> "The cases dismissed under rule nine of this Court are governed by the rule, *and raise no question of jurisdiction.*"

Although, therefore, the statute says the transcript shall be "annexed" to and returned "with" the writ of error, at the "*day* and place *therein mentioned*," no question of *jurisdiction* arises although it be not returned until the last day of the term. The act does not say it shall be then returned. Therefore, our learned adversary's contention (unless he differ from this Court, speaking through Mr. Justice Miller), is, that there is no defect of jurisdiction when the transcript is not returned on the day appointed by law, but that this Court has no jurisdiction if the transcript be not returned on a day not so appointed, viz., on the last day of the term!

In *Castro* v. *United States*, 3 Wall. 46, the objection was made, by motion to dismiss at the December term, 1865, (no waiver being claimed,) that the decree was entered November 23, 1859, from which an appeal was allowed, the district attorney being present in Court, but that on this no citation was issued, and the record was not filed and docketed, but that on May 29, 1865 (after the five years had expired), a citation returnable to the December term, 1865, was issued and served, and the writ and record were returned and filed accordingly. The

Court held that, by not docketing at the return term, the appeal became void; that the presence of the district attorney in court, when the appeal was granted at another term than that of decree, did not waive citation, and that the subsequent citation was unavailing because there was then no subsisting appeal.

This case in no wise conflicts with our contention. There was no claim of waiver, and no excuse for the delay, and whether the objection was treated as going to the jurisdiction, or founded upon an irregularity, the judgment of the Court could not have been different.

Edmonson v. *Bloomshire*, 7 Wall. 306, follows *Castro* v. *United States*, and the remarks just made equally apply to it. No question of waiver was presented, and the judgment of the Court, dismissing the appeal upon motion, was correct, whether the views presented in this argument or those of our antagonist prevail. The most that can be made of these two cases against us grows out of the fact that the words, "want of jurisdiction," are used in them as descriptive of the result of the omission to return the transcript in time, but whether this is want of jurisdiction over the subject-matter, which no consent can cure, or over the person, which is supplied by appearance, is not discussed. True, it is said, in *Edmonson* v. *Bloomshire*, page 310, that:

> "The Court has never hesitated on this rule, wherever it has appeared from the record that the case came within it, although no motion to dismiss was made by either party. In fact, treating it as a matter involving the jurisdiction of the Court, we can not do otherwise."

Which is just as true of a case where a writ of summons, or a subpœna in chancery has been returned not served, as in the case of an action brought for a cause not within the legal jurisdiction of the Court.

Suppose, however, that we are wrong in treating this as a case of "irregularity," as it was called by Chief Justice Marshall, and that the defect is jurisdictional, we reach the question—is it want of jurisdiction over the subject-matter, which can not, or over the person, which may be waived?

It seems to us clear that it is not the former.

First. This Court so held, in *Wood* v. *Lide*, and, on the contrary, sustained and exercised jurisdiction because the "appearance of the defendant in error" had "waived all objection to the irregularity of the return."

Secondly. This Court has never held that the objection might not be waived, or in any way overruled, criticised, or doubted *Wood* v. *Lide*, in this regard. *The Lucy*, 8 Wall. 309, comes nearest to it, yet there Chief Justice Chase does not refer to *Wood* v. *Lide*, and in that case there was a manifest want of jurisdiction over the subject-matter, as the appeal should have been to the *Circuit* Court.

Thirdly. Although the methods employed for perfecting appeals in the State Courts are, in substance, similar to those adopted in the federal procedure, no State Court has ever yet held that a defect or irregu-

larity of this kind amounts to a want of jurisdiction over the subject-matter. On the contrary, it has been often held to the contrary, and that like objections may be waived, and are waived by a general appearance.

Wherever a second appeal may be taken, it is obvious that there can be no want of jurisdiction over the subject-matter. The following passage from Mr. Justice Catron's dissenting opinion, in *United States* v. *Fremont*, 18 How. 37, makes this very clear:

> "The motion to dismiss for want of prosecution, and the motion to dismiss for want of jurisdiction to entertain the appeal, are different and distinct in their character; the one dismisses the appeal and allows a second, and the other bars it."

For, the record being on file, and the parties ready to submit the cause for judgment, there is no reason for requiring them to delay until a new appeal can be allowed and the record refiled. *Lex neminem ad vana cogit.* And whatever they may thus compel the Court to do, it certainly can not be said to be without jurisdiction to do by their consent.

Nor is a case of this kind reached by the test applied to cases of want of jurisdiction over the subject-matter, furnished in *United States* v. *Arredondo*, 6 Peters, 709.

In *Wilgus* v. *Gettings*, 19 Iowa, 82, it was held that where the Court has "jurisdiction of the subject-matters of the suit," although the appeal would, on motion, have been dismissed because not taken within twenty days from the rendition of the judgment of the justice of the peace, the submission to the jurisdiction of the

District Court by appearance and taking steps in the cause is a waiver.

"Taking the appeal, executing the bond, and delivering the papers to the Circuit Court, are the means provided by law for transferring the cause from the justice and constable to the Circuit Court. *These measures are in the nature of process to remove the cause from the inferior to the superior Court.* Where process by which a Court obtains jurisdiction of a cause is irregular, and no objection is made, the irregularity is waived. *The irregularity is not like the case of a defective jurisdiction over the subject-matter; for the statute gives jurisdiction to the justice and the constable in the first instance, and to the Circuit Court by appeal.*"

Pearce v. *Swan*, 1 Scam. 266, affirmed and repeated in *Mitchell* v. *Jacobs*, 17 Ill. 235.

See also *Thompson* v. *Lea*, 28 Ala. 453.

The following is the syllabus of *Stone* v. *Morgan*, 10 Paige, 615:

"In cases where the time for appealing is limited by statute, the appellate Court is not authorized to extend the time for appealing. And where the appeal is not entered within the time allowed by the statute, it will be dismissed, *unless the objection that the appeal was not brought in time has been waived by the adverse party.*"

"A general appearance by the respondent in the appellate Court, and noticing the appeal for argument, are positive acts of submission to that Court, and amount to a waiver of the right to have the appeal dismissed, on the ground that it was not made in time."

Pearson v. *Lovejoy*, 53 Barb. 407.

"The service of the notice of appeal on the respondent, within the time, is not merely a directory statute, it is *imperative*.

The section requires that certain things shall be done within twenty days, and if they are not *all* done, *there is no appeal.* This is a jurisdictional question, which can be taken advantage of at any time, *where there is no positive act of submission to the tribunal whose jurisdiction is questioned.*"

People v. *Eldridge*, 7 How. Pr. 108.

In *Stevenson* v. *McNitt*, 27 How. Pr. 335, where the defendant had noticed the appeal for argument, and allowed two terms to pass,

"it seems that a motion to dismiss an appeal, on the ground that the appeal was brought after the time allowed by law for bringing appeals, may be waived by laches in moving."

In *Jacobs* v. *Morange*, 1 Daly, 523, it was held, that—

"Where a Court has not jurisdiction of the subject-matter, the consent of parties will not confer it; but a consent that an appeal may be brought after the time has elapsed for bringing it, is not liable to that objection. The appellate Court having the general power to review judgments upon appeal, such a consent does not confer it, but is a mere waiver of the right to insist that the time has passed for bringing the appeal."

Vreedenburgh v. *Calf*, 7 Paige, 419, holds that the delay in procuring the return of the transcript, upon appeal, may be excused.

In *Hastings* v. *Halleck*, 10 Cal. 31, there was a motion to dismiss the appeal, and the Court held that if the necessary steps were not taken, there is no appeal, and "this Court has no jurisdiction of the case." But it is also said, that

"these provisions of the code *are intended for the repose of parties*, and must be strictly complied with."

It would seem to follow, that parties may waive their repose.

In *Walea* v. *McLean*, 14 Texas, 18, there was a motion to dismiss the appeal. The following is the syllabus:

"An appeal or writ of error must be docketed at the term to which it is returnable; and if it is not, its force and effect are destroyed, for any purpose whatever. It can no longer delay the issuance of an execution, or be docketed or tried in the appellate Court."

But the Court say (Hemphill, C. J., p. 19):

"There was an agreement at the term in 1854, that the cause should be continued, by consent, but this will not, of itself, take the case out of the rule. Had the parties agreed that the cause should remain on the docket, as if brought up by writ of error, in order to save the expense of petition, citation, and transcript, the agreement would have been valid, and the cause would have had a standing on the docket. But the mere agreement to continue can not be regarded as equivalent to an agreement that the cause should stand as on writ of error, and the motion is therefore sustained, and the cause dismissed."

In several cases it has been held that a joinder in error waives the right to move to dismiss the appeal.

McCall v. *Lesher*, 2 Gilm. 46.
Bolton v. *McKinley*, 19 Ill. 404.
Matson v. *Connelly*, 24 Ib. 142.
Myers v. *Segars*, 41 Ala. 383.
Alexander, Adm'r v. *Nelson*, 42 Ib. 462.

II.

HAS THE OBJECTION BEEN WAIVED?

Besides the facts stated in the earlier pages of this argument, the files of this case show that the briefs of counsel for appellees, arguing the case upon its merits, were filed on January 20, 1879, and your Honors know that the objection now under consideration was not suggested until the case was called for hearing, on January 21, 1879, when counsel for both parties, being present, were about to enter upon oral argument.

We contend, *first*, that if the delay in docketing the case and filing the transcript be an "irregularity," as it was denominated by Chief Justice Marshall, in *Wood* v. *Lide*, it is too late to make the objection after appearance, and when briefs have been filed upon both sides, and oral argument is about to proceed. If your Honors will examine these briefs you will find an assignment of errors in one, and in the other a joinder, not in technical form, but in the shape of an able and vigorous denial, in part, of the propriety and technical sufficiency, and, in part, of the legal and equitable sufficiency of the errors so assigned.

Indeed, the brief of counsel for appellees goes further, for as to the third, fourth, fifth, sixth, seventh, eighth, and tenth errors assigned, it amounts to a special demurrer, objecting for non-conformity to the rules of this Court, and as to the others, it is a joinder. Under

"If the motion was grounded upon irregularity, or error in the judgment alone, aside from the question of jurisdiction, the motion itself would constitute such an appearance as would have the effect to waive the question of jurisdiction."

But the objection that the right to appeal is in parties severally, and the appeal is jointly prosecuted, is not an objection to jurisdiction.

In *Carter* v. *Thompson*, 41 Ala. 375, it is held that—

"Where an appeal from a decree in chancery is sued out in the name of one of the defendants, and errors are assigned in the names of all the defendants, a joinder in error is a waiver of all objections that might be raised, either to the appeal or to the assignments of error."

This decision goes far beyond any proposition we need to make; for, as to the defendant, in whose name the appeal was sued out, it proceeds upon the ground that the joinder of others in the assignment of errors was not a jurisdictional defect, and was cured by joinder in error, and that as to the others, who did not appeal, the joinder supplied the defect of jurisdiction.

Fourthly. Going into the argument of a case upon its merits, as was done here by filing the briefs, is a waiver of all objections to jurisdiction. It is, to use the language of the New York Courts, a "positive act of submission."

Pearson v. *Lovejoy*, 53 Barb. 407.

People v. *Eldridge*, 7 How. Pr. 108.

See also *People* v. *Erie Common Pleas*, 6 Wend. 549.

Kinsey v. *Lessee of Scarborough*, 17 Ga. 540.
Durfee v. *McClurg*, 5 Mich. 532.
Bixler's Adm'r v. *Parker*, 3 Bush, 166.

The following is the syllabus of the case of *Cleveland, Col. & Cin. R. R. Co.* v. *Mara*, 26 Ohio St. 185:

"1. Where counsel for defendant in error, in a case reserved in the District Court, appeared in the Supreme Court, and, without objecting to its jurisdiction, assented to a setting of the case for oral argument, and the same was afterward partially argued on its merits, by both sides: *Held*, that these acts constituted a general appearance in the case, and a submission to the jurisdiction of the Court.

2. Such appearance in the Supreme Court estops the defendant from denying his appearance in the District Court; and, therefore, where the case is reserved in the District Court, within the three years limited by statute for filing petitions in error, it is not barred by the statute, although the appearance in the Supreme Court took place after the expiration of the three years."

The case of *State of Indiana* v. *Walters* was decided by the Supreme Court of Indiana, February 21, 1879. The following is an extract from the syllabus copied from the *Cincinnati Enquirer* of February 22, 1879:

"Appellee waives his motion to dismiss an appeal in this Court, because the appeal was not filed in time, by appearing and submitting the cause."

See also—

Cromwell v. *Baty*, 43 Ind. 357.
Collins, Adm'x, v. *Rose*, 59 Ind. 33.

The filing of briefs under the rule is an application to the Court to affirm the judgment. To apply the

language of Chief Justice Dixon, in *Alderson* v. *White*, 32 Wis. 311:

"It would be a submission on their part to the jurisdiction of the Court, because the relief granted would be inconsistent with any other reasonable hypothesis. . . . And the asking of such relief, whether granted or not" (in that case it was by motion to dismiss both for irregularity and want of jurisdiction), "is also a submission and waiver of jurisdictional defect, and for the same reason. The party seeking to take advantage of want of jurisdiction in every such case must object on that ground alone, and keep out of Court for every other purpose. If he goes in for any purpose incompatible with the supposition that the Court has no power or jurisdiction on account of defective service of process upon him, he goes in and submits for all the purposes of personal jurisdiction with respect to himself, and can not afterward be heard to make the objection."

Fifthly. In *Abbott* v. *Semple*, 25 Ill. 107, Breese, J., says (p. 108):

"When a party only appears for the purpose of showing he is not properly before the Court, he should so confine it in his motion, else he may be adjudged to have appeared for all purposes—that his appearance, not being limited to a specific purpose, will be held to be a general appearance."

And in *Flake* v. *Carson*, 33 Ill. 518, it was held that—

"When a party appears for a specific purpose, as to show that he is not properly before the Court, he should so restrict his motion. If he makes several motions in the cause not limiting his appearance to a specific purpose, he will be held to have appeared generally for all purposes."

In *Crowell* v. *Galloway*, 3 Nebraska, 215, it was held that the Court had acquired no jurisdiction of the case, because the summons was not returnable on the day appointed by law; but that if the

"defendant intend to rely on the want of personal jurisdiction, as a defence to a judgment entered against him, he must appear, if at all, for the sole purpose of objecting to the jurisdiction of the Court; if he appear for any other purpose, such appearance is general and a waiver of all defects in the original process, and an acknowledgment of the complete jurisdiction of the Court in this action.

In order to object to the jurisdiction of the Court, either over the person or the subject-matter, a special appearance may be made; but if the appearance is for any other purpose, it will be considered general. An application for a continuance is an appearance, and waives defect in the service of process."

Ulmer v. *Hiatt*, 4 Greene (Iowa), 439.
Clark v. *Blackwell*, Ib. 441.

For these reasons, we respectfully submit, the Court has acquired full jurisdiction over the cause, and it should now again proceed, beginning where it was interrupted, for the purpose of this discussion, by Mr. Harris, on January 21st last.

In submitting the motion, we owe it to ourselves to explain that upon investigation it turned out that the bond referred to in Mr. Fox's telegram, and upon which we expressed the belief that we might show a

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IN THE

Supreme Court of the United States.

Susan P. Grigsby, individually, and as Administratrix of J. Warren Grigsby, deceased.
Appellant,

vs.

C. W. Purcell, et al.
Appellees.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF KENTUCKY.

ON MOTION TO DISMISS APPEAL.

ARGUMENT OF

HOADLY, JOHNSON & COLSTON, and
JOHN W. STEVENSON,
Of Counsel for Appellant.

A motion is made to dismiss the appeal in this case, because, as it is said, the appellants are severally interested, while the appeal is joint.

The prayer for, and allowance of appeal is in these words (Record, 130):

"And on another day of our said term of our said Court, to wit, on Tuesday, February 23, 1875, came the defendants, J. Warren Grigsby and Susan P. Grigsby, by F. T. Fox, Jr., their counsel, and pray an appeal from the decree rendered in this cause to the Supreme Court of the United States, which appeal is granted."

We admit that General and Mrs. Grigsby had several and separate interests in this case, but we deny that the appeal is joint. On the contrary, our contention is, that such appeal follows the character, and partakes of the nature of the interests of the appellants—is joint, if they are jointly interested; and is several, if they are severally interested in the controversy as litigants.

Any other construction makes both the prayer and the allowance, the action of the parties and of the Court, nugatory and vain. No such construction is permitted in the case of a deed or contract, much less should be applied to the action of a Court.

If tenants in common unite in a joint conveyance, the title of each passes. If A., owning Whiteacre, and B., owning Blackacre, should jointly convey both tracts to C., who would be bold enough to dispute his title? "*Ut res magis valeat quam pereat*," is the rule. (Brown's Legal Maxims, *522.)

In *Lessee of Foster* v. *Denison*, 9 Ohio, 124, Lane, J., says:

> "Now a deed may be held to operate in any form of conveyance that will carry into execution the lawful objects of its makers. Whether its form be feoffment, grant, bargain and sale, or release, the deed may inure as either."

The appellants did not pray a *joint* appeal. The Court did not grant an appeal to them *jointly*. It was not allowed to J. Warren Grigsby *with* Susan P. Grigsby, but to one *and* the other—in other words, to each of them. The contention of the plaintiff is not founded on the *language* of the prayer or allowance, but upon an in-

terpolation, to be inserted by legal intendment. Because General and Mrs. Grigsby prayed an appeal, at the same time, and by the same counsel, therefore it must be presumed, is the argument, that they prayed a joint appeal, and the prayer and allowance must be read as if it explicitly stated that they prayed a joint appeal, and as if a joint appeal were allowed in so many words.

Now it would be quite as fair, and much more consistent with the relations of the parties, to treat their prayer and its allowance as if the word "several" were inserted. It certainly cannot be presumed that they intended to pray an appeal which they had no right to ask, nor the Court to grant, nor that the Court have allowed an appeal which would be of no avail. Had the appeal been professedly and avowedly joint, there might be some foundation for the contention of our learned adversary. But he can not make it joint by presumption, in order to destroy it. Presumptions are resorted to to support, not to overthrow judgments.

"There is no principle of law better settled than that every act of a Court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears. And this rule applies as well to every judgment or decree rendered in the various stages of their proceedings from the initiation to their completion, as to their adjudication that the plaintiff has a right of action." *Voorhees* v. *Bank of the United States*, 10 Peters, 471.

"It is undoubtedly true, that a Superior Court of general jurisdiction, proceeding within the general scope of its powers is presumed to act rightly. All intendments of law in such cases are in favor of its acts." *Galpin* v. *Page*, 18 Wallace, 365.